Petition

81-239

Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

NO.

In the Supreme Court of the United States

October Term, 1981

DAVID BROAD,

Petitioner,

vs.

ROCKWELL INTERNATIONAL CORPORATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROD PHELAN, ESQ.
Carrington, Coleman, Sloman & Blumenthal
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

THOMAS H. SEYMOUR, ESQ.
Kenny Nachwalter & Seymour, P.A.
One Biscayne Tower
Miami, Florida 33131

HUGO L. BLACK, JR., ESQ.
Kelly, Black, Black & Earle, P.A.
1400 Alfred I. duPont Building
Miami, Florida 33131

Attorneys for Petitioner

QUESTION PRESENTED

Whether the boilerplate indenture language of the standard trust indenture applicable to, at least, $13 billion of convertible debentures issued by hundreds of corporations all over the nation mandates that the holders of convertible debentures in an acquired corporation after a cash-out merger be allowed an option to convert into whatever either a majority or a minority shareholder of the acquired corporation receives in the merger, or whether such a debentureholder is limited as a matter of law after the merger to an option to convert only into whatever a minority shareholder of the corporation receives in the merger?

TABLE OF CONTENTS

Page

Question Presented .....

Parties To The Proceeding .....

Table Of Contents .....

Opinions Below .....

Jurisdiction .....

Boilerplate Indenture Provision Governing $13 Billion Of Convertible Debentures .....

Statement Of The Case .....

Reasons For Granting The Writ .....

Conclusion .....

NO.

In the Supreme Court of the United States

October Term, 1981

DAVID BROAD,

Petitioner,

vs.

ROCKWELL INTERNATIONAL CORPORATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner David Broad, on behalf of the class of former convertible debentureholders represented by him, respectfully prays that writ of certiorari issue to review the judgment and opinion rendered on April 17, 1981 by the United States Court of Appeals for the Fifth Circuit sitting *en banc.*

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals were: Plaintiff-Appellant, David Broad, individually, and as class representative of all holders of $40,000,000 of 4⅞ Convertible Subordinated Debentures due January 1, 1987 of Collins Radio Company, and Defendants-Appellees, Rockwell International Corporation, Collins Radio Company, United States Trust Company of New York, Robert C. Wilson, Robert Anderson, Dupuy Bateman, Jr., Wallace W. Booth, Willard F. Rockwell, Jr., W. William Roodhouse, Donald R. Beall, Raymond J. Raff, Robert L. Cattoi, John E. Drick, J. Rawles Fulgham, Jr., Thomas L. Martin, Jr. and Robert L. Erickson.

OPINIONS BELOW

The opinion of the *en banc* Court of Appeals appears at 642 F.2d 929 (Appendix "A-1"); the order granting rehearing *en banc* appears at 618 F.2d 396 (Appendix "A-2"); the opinion of the three judge panel of the Court of Appeals reversed by the *en banc* opinion appears at 614 F.2d 418 (Appendix "A-3"); the opinion of the District Court is included in the Appendix at "A-4."

JURISDICTION

The *en banc* judgment of the Court of Appeals for the Fifth Circuit was entered on April 17, 1981, and this petititon for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

BOILERPLATE INDENTURE PROVISION GOVERNING $13 BILLION OF CONVERTIBLE DEBENTURES

"Section 4.11. In case of any consolidation of the company with, or merger of the Company into, any other corporation (other than a consolidation or merger in which the Company is the continuing corporation), or in case of any sale, conveyance, transfer or other disposition to any other corporation of the property and assets of the Company as an entirety or substantially as an entirety, the corporation formed by such consolidation or the corporation into which the Company shall have been merged or the corporation which shall have acquired such property and assets, as the case may be, shall execute and deliver to the Trustee a supplemental indenture (which shall conform to the applicable provisions of the Trust Indenture Act of 1939 as then in effect) providing that the holder of each Debenture then outstanding shall have the right (until the expiration of the conversion right of such Debenture) to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such consolidation, merger, sale, conveyance, transfer or disposition by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such consolidation, merger, sale, conveyance, transfer or disposition. Such supplemental indenture shall provide for adjustments which shall be as nearly equivalent as may be practicable to the adjustments provided for in this Article Four. The above provisions of this Section 4.11 shall similarly

apply to successive consolidations, mergers, sales, conveyances, transfers or dispositions."

STATEMENT OF THE CASE

In 1971 Rockwell International Corporation ("Rockwell") acquired control of Collins Radio Company ("Collins"). In August 1973, Rockwell made a cash tender offer of $25.00 per share for all of the outstanding common stock of Collins and indicated its intent to merge Collins into Rockwell if the offer succeeded. By October 1, 1973, Rockwell had acquired more than two-thirds of the outstanding common stock of Collins, which enabled it to effect a cash-out merger upon the non-tendering minority shareholders of Collins. Under the Collins-Rockwell Agreement and Plan of Merger each minority holder of Collins stock received a cash payment of $25.00 per share. Rockwell, the majority shareholder, received a pro rata share of the Collins assets for each share of its Collins stock. Those assets have since produced the lion's share of Rockwell's income.

This case involves the treatment in the cash-out merger of Petitioner David Broad and other holders of $40,000,000 of Collins 4⅞% convertible subordinated debentures issued in January 1967 and due January 1, 1987. The debenture certificates, the prospectus, and all publicly disseminated information pertaining to the debentures, provided that the holder could convert into common stock at any time between January 1967 and January 1, 1987, unless the debentures were sooner redeemed.

Broad brought a class action against Collins, Rockwell, the controlling persons of both, and United States Trust Company of New York ("Trust Company"), the indenture trustee, for entering into a supplemental indenture in connection with the cash-out merger of Collins into Rockwell where the Trust Company, as trustee for Broad and the other convertible debentureholders, gave away the debentureholders' option to convert into common stock without obtaining their authority and without compensating them.* This loss to Broad and the class was engineered by agreement between Rockwell and the Trust Company ensuring that the debentures' equity conversion feature would be reduced in the cash-out merger to a valueless option to convert into what the *minority* shareholders would receive in the merger ($25 per conversion unit or $344.75 for each $1,000 face value debenture with a market price approximately double the price received). Rockwell, on the other hand, would receive all of the assets of Collins and the right to participate in the future earnings of those assets in return for its majority holding of Collins common stock.

The trial court directed a verdict against Broad and in favor of Collins, Rockwell, the controlling persons of both, and the Trust Company on the ground that, upon a cash-out merger, the trust indenture clearly and unambiguously mandated a supplemental indenture limiting the convertible debentureholders to an option

---

*The basis for jurisdiction in the District Court was Broad's claims under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa (1976), and under 27 U.S.C. §§1331 and 1337 (1976).

to convert into what the minority shareho' lers received in the merger.

Broad appealed. A panel of the Court of Appeals was unable to discover any such clear and unambiguous mandate in the indenture and remanded the case for jury trial. (A-3).

Rockwell and the Trust Company sought rehearing. Their petition asserted errors in the panel decision which, under Fifth Circuit Rule 16.2.4, would, at most, justify panel rehearing and not *en banc* rehearing. Nevertheless, Rockwell and the Trust Company, along with thirteen investment banking firms which filed supporting *amici curiae* briefs and claimed to represent the investment bankers of Wall Street, a supposedly independent Wall Street law firm claiming to represent the Wall Street lawyers who regularly deal with trust indentures, the Securities Industry Association, the Chamber of Commerce of The United States of America, and the American Bankers Association, descended on the Court of Appeals like a swarm of lobbyists, stridently demanding rehearing *en banc*. Rockwell, the Trust Company and the *amici* all indicated that they represented one hundred years of debenture expertise and that only an inexpert fool would believe that the option to convert into common stock would ever survive a cash-out merger. Rockwell, the Trust Company and expert *amici* went on to tell the Court of Appeals that it had been well-known in the debenture financial community for over 100 years that all merger provisions in trust indentures are the same old boilerplate. They suggested, therefore, that the decision in this case would affect holders of $13 billion in convertible debentures in hundreds

of corporations all over America and that permitting Petitioner a jury trial might, in the words of the Chamber of Commerce, "have a profound negative impact throughout the economy." In the teeth of its rule governing *en banc* rehearing and without giving Petitioner any opportunity to be heard on the propriety of industry lobbying through *amici* briefs or the unavailability of *en banc* rehearing under its rules, the Fifth Circuit was stampeded by these lobbyists in *amici* clothing into granting rehearing *en banc*.

In an extended and tortured opinion based on the expertise of the author, the expertise in the *amici* briefs, treatises, and the rules of construction (used only, according to the Hornbooks, to interpret ambiguous documents), the Court of Appeals agreed with Rockwell, Trust Company and their *amici* that the boilerplate of the standard indenture clearly and unambiguously limits convertible debentureholders upon a cash-out merger to an option to convert into only what is receivable by *minority* shareholders in the merger.

The boilerplate provision of the standard indenture (Section 4.11), relied on exclusively for this conclusion, on its face does not support that interpretation. Section 4.11 provides in pertinent part, as follows:

> In case of any consolidation of [Collins] with, or merger of [Collins] into, any other corporation . . . , the corporation formed by such consolidation or the corporation into which [Collins] shall have been merged . . . shall execute and deliver to the [Trust Company] a supplemental indenture . . . providing that the holder of each Debenture

> then outs...ng shall have the right (until the expiration of the conversion right of such Debenture) to convert such Debenture into the kind and amount of shares of stock and other securities and property *receivable upon such consolidation [or] merger . . . by a holder of the number of shares of Common Stock of [Collins] into which such Debenture might have been converted immediately prior to such consolidation [or] merger . . . .* (Emphasis added).

Construing 4.11 most strongly for Rockwell, it limits a convertible debentureholder after the merger to an option to convert only into what is receivable by *any* holder of Collins common stock upon a merger—not just a *minority* holder of common stock. The property receivable by the majority shareholder, Rockwell, was a pro rata share of the Collins assets and the opportunity to participate in the future earnings of those assets.

After the merger, Broad and the convertible debentureholders were entitled by the clear terms of §4.11 to convert into what was receivable by either a minority or majority shareholder in the merger. Rockwell received for each of its shares, a pro rata share of the Collins assets and the right to participate in the future earnings of those assets. The convertible debentureholders should have been accorded in the Supplemental Indenture executed by Rockwell and the Trust Company the option to convert into precisely the same pro rata interest in the Collins assets and the right to participate in the future earnings of those assets. The convertible debentureholders would have received that pro rata

interest had they been accorded after the merger the option they sought throughout this suit to convert into Rockwell common stock.

REASONS FOR GRANTING THE WRIT

Review Of the Decision Below By This Court Is Of Overwhelming National Importance To Non-Party Holders Of Over $13 Billion Of Convertible Debentures In Hundreds Of Corporations All Over America Governed By Identical Boilerplate Indenture Provisions Because, Contrary To The Holders' Legitimate Expectations, The Court Of Appeals Interpretation Reduces The Option To Convert In The Convertible Debentures Of An Acquired Company To A Mere Option To Convert Into Only What The Minority Shareholders Receive In The Merger.

This is the first contested case concerning the treatment of the equity conversion feature of a convertible debenture of a company acquired in a cash-out merger. As the thirteen investment banker *amici* pointed out to the Court of Appeals in their plea for *en banc* rehearing:

> The treatment of this indenture is a matter of exceptional importance to *amici* because it may affect other outstanding debentures of an aggregate value of more than $13 billion, issued by hundreds of corporations not parties to this case. . . . The outcome here may affect them all because the indenture in this case contains provisions governing the treatment of debentures in a merger which are in substance the same as those found in almost every other convertible debenture indenture.

Even the opinion of the Court of Appeals acknowledges that convertible debentureholders heretofore have never received any warning from the

financial community that, in the event of a cash-out merger, the equity conversion feature of their security would automatically be limited to an option to convert into what the minority shareholders received in the merger. 642 F.2d at 961.

Once the equity conversion feature is reduced to an option to convert into what is received by minority shareholders in a cash-out merger, a convertible debenture is no longer a convertible debenture. Its fundamental nature has been changed from a combination debt and equity security to a plain debt security—from a convertible debenture to a plain debenture. In dissenting from the majority *en banc* opinion in the Court of Appeals, Circuit Judge Henderson stated:

> Convertible debentures are a wholly different investment vehicle from common stocks, and are, contrary to the assertion of the majority, presumably purchased by persons with different views of the future. The current price of any security reflects the market's collective judgment of its prospects, with all possibilities discounted for their probability. Conversion rights will be exercised only if profitable, so the probability that the underlying stock will exceed the conversion price is a determinant of the value of a convertible security. But if the stock price stays down, the debentureholder's primary concern will be his interest income. The owners of stock, on the other hand, carry the entire burden of any decline in the value of their shares. All equityholders hope for a bright tomorrow, but the convertible debentureholder,

> who is also a corporate creditor, pays for protection against a gloomy future.
>
> Debentureholders accept low interest precisely because they want upside participation without downside risk. The effect of the court's decision is to retain the low interest rate payable to the plaintiffs while denying them a right to participate in increases in the value of Collins' business. And the value of the conversion right has not only been frozen, it has been rendered practically worthless. 642 F.2d at 964 n. 1.

What is left after the equity conversion feature is like a car without high gear.

> If, indeed, the trust indentures for the $13 billion of affected convertible debentures are all the same and the decision in this case will therefore determine the fate of those $13 billion of convertible debentures upon a cash-out merger, then, the investing public is entitled to have this crucial question ultimately ruled on not by a regional circuit court of appeals, but by the Supreme Court, the judicial conscience of our nation.
>
> That national judicial conscience, we submit, cannot countenance a grossly unjust decision that changes the option to convert into common stock in American convertible debentures into an option to convert only into what just the minority common stockholder receives in a cash-out merger on the basis of language in a boilerplate indenture provision that says no such thing.

CONCLUSION

This Court should issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit and determine this nationally important issue.

Dated: July 15, 1981

Respectfully submitted,

ROD PHELAN, ESQ.
Carrington, Coleman, Sloman & Blumenthal
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

THOMAS H. SEYMOUR, ESQ.
Kenny Nachwalter & Seymour, P.A.
One Biscayne Tower
Miami, Florida 33131

HUGO L. BLACK, JR., ESQ.
Kelly, Black, Black & Earle, P.A.
1400 Alfred I. duPont Building
Miami, Florida 33131

By: /s/ HUGO L. BLACK, JR.
Hugo L. Black, Jr.

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit were served by first class mail, postage prepaid, on the following counsel, this 15th day of July, 1981:

Donald I Strauber, Esq.
Chadbourne, Park, Whiteside & Wolff
30 Rockefeller Plaza
New York, New York 10020

Ernest E. Figari, Jr., Esq.
Hewett, Johnson, Swanson & Barbee
4700 First International Building
Dallas, Texas 75270

John P. Campbell, Esq.
Curtis, Mallett-Prevost, Colt & Mosle
100 Wall Street
New York, New York 10005

William B. West, III, Esq.
Clark, West, Keller, Sanders & Butler
First International Building
Dallas, Texas 75270

/s/ HUGO L. BLACK, JR.
Hugo L. Black, Jr.

Appendix

81-239

Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

NO.

In the Supreme Court of the United States

October Term, 1981

DAVID BROAD, et al.,

Petitioner,

vs.

ROCKWELL INTERNATIONAL CORPORATION, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROD PHELAN, ESQ.
Carrington, Coleman, Sloman & Blumenthal
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201

THOMAS H. SEYMOUR, ESQ.
Kenny Nachwalter & Seymour, P.A.
One Biscayne Tower
Miami, Florida 33131

HUGO L. BLACK, JR., ESQ.
Kelly, Black, Black & Earle, P.A.
1400 Alfred I. duPont Building
Miami, Florida 33131

Attorneys for Petitioner

INDEX

Page

A-1
The Opinion of the *En Banc* Court of Appeals . . . A-1

A-2
The Order Granting Rehearing *En Banc* A-100

A-3
The Opinion of the Three Judge Panel of the Court of Appeals Reversed by the *En Banc* Opinion 181

A-4
The Opinion of the District Court 183

David BROAD et al.,
Plaintiffs-Appellants,

-v-

ROCKWELL INTERNATIONAL CORPORATION et al.,
Defendants-Appellees.

No. 77-2963.

United States Court of Appeals,
Fifth Circuit.

April 17, 1981.

Debenture holder brought class action against issuing corporation, successor corporation, controlling officers of both corporations, and trustee under indenture agreement for alleged breach of indenture agreement and for alleged securities law violations. The United States District Court for Northern District of Texas, Robert M. Hill, J., entered judgment on defendants' motion for directed verdict, and appeal was taken. The Court of Appeals, 614 F.2d 418, affirmed in part and reversed and remanded in part. After ordering appeal to be reheard on en banc, 618 F.2d 396, the Court of Appeals, Randall, Circuit Judge, held that: (1) plain language of indenture agreement permitted successor corporation and trustee to execute supplemental indenture providing for postmerger conversion rights of debenture holders allowing only conversion into cash; (2) successor corporation and trustee, which performed obligations imposed on them under original indenture provision governing rights of debenture holders upon merger of

issuing corporation, did not violate covenant of good faith and fair dealing; (3) neither successor corporation nor trustee violated fiduciary duty of good faith and fair dealing; (4) issuing corporation, successor corporation, and trustee could not be liable on holders' 10b-5 claim for allegedly engaging in fraudulent scheme to deny holders their rights to convert into common stock following merger; and (5) issuing corporation, successor corporation, and trustee could not be liable, under Rule 10b-5, for allegedly scheming to defraud debenture holders of their right to convert debentures into common stock following merger by substituting right to convert into cash.

Affirmed.

Henderson, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Corporations—473

Mergers may extinguish all conversion rights of holders of convertible debentures, absent explicit contractual provisions to contrary.

2. Contracts—147(2)

Under New York law, written contract is to be interpreted so as to give effect to intention of parties as expressed in unequivocal language they had employed.

3. Contracts—147(1)

In interpreting contract, due consideration must be given to purpose of parties in making contract, and

fair and reasonable interpretation consistent with such purpose must, under New York law, guide courts in enforcing agreement.

4. Contracts—169

Under New York law, interpretation of unambiguous contract provision is function for court rather than for jury, and matters extrinsic to agreement may not be considered when intent of parties can be gleaned from face of instrument.

5. Contracts—143(3)

Under New York law, court may not rewrite term of contract by "interpretation" when such term is clear and unambiguous on its face.

6. Contracts—147(2)

In interpreting contract, court must, under New York law, be concerned with what parties intended, but only to extent that they evidenced what they intended by what they wrote.

7. Contracts—143(3)

Under New York law, a court may not rewrite contract to accord with its instinct for dispensation of equity under facts of case.

8. Contracts—143.5

Under New York law, entire contract must be considered, and, as between possible interpretations of

allegedly ambiguous term, interpretation will be chosen which best accords with sense of remainder of contract, and such interpretation is favored which will make every part of contract effective.

9. Contracts—156

Under New York law, specific contract provision will not be set aside in favor of catchall clause.

10. Contracts—155

Under New York law, normal rule of construction that any fair doubt as to meaning of words chosen by drafting party should be resolved against such party is inapplicable where there are not two possible and reasonable interpretations.

11. Contracts—152

Because courts are to adjudicate rights of parties according to unambiguous terms of contract, courts must, under New York law, give words and phrases employed in contract their plain meaning.

12. Corporations—473

Press releases and advertisements could not constitute enforceable contract provisions governing rights of holders of convertible debentures issued under indenture agreement.

13. Corporations—473

Under New York law, plain language of indenture provision stating that debenture holders had right, upon merger, to convert debenture "into the kind and amount of shares of stock and other securities and property receivable upon * * * merger * * * by a holder of the number of shares of Common Stock of [issuing corporation] into which such Debenture might have been converted immediately prior to * * * merger" permitted successor corporation and trustee to execute supplemental indenture providing for postmerger conversion rights of debenture holders allowing only conversion into cash where holders of issuer's common stock received only cash in exchange for their shares.

14. Corporations—473

Under New York law, neither indenture provision specifying that debenture could, "at any time [while debenture was outstanding] be converted * * * into fully paid and non-assessable shares * * * of Common Stock of [issuer]," nor provision requiring issuer to "at all times reserve and keep available * * * full number of shares of Common Stock then issuable upon the conversion of all outstanding Debentures," entitled holders to convert debentures into common stock of successor corporation following merger where indenture provided that holder had right, upon merger, to convert debenture "into the kind and amount of shares of stock and other securities and property receivable upon * * * merger * * by a holder of the number of shares of Common Stock of [issuer] in which such Debenture might have been converted immediately prior to such * * * merger,"

and holders of issuer's common stock received only cash in exchange for shares.

15. Corporations—473

Execution of supplemental indenture complying with directives of provision in original indenture governing conversion rights of holders upon merger did not "adversely affect the interests of the holders of any of the Debentures," and thus execution of the supplemental indenture, following merger of issuing corporation into successor corporation, did not violate provision of original indenture governing circumstances in which issuer and trustee could execute supplemental indenture.

16. Contracts—143(3)

Under New York law, it is not function of court to rewrite contract's terms in process of "interpretation" to make them accord with court's sense of equity.

17. Contracts—168

Under New York law, every contract governed by the laws of New York necessarily contains implied-by-law covenant to act fairly and in good faith in course of performing the contract.

18. Corporations—473

Covenant of good faith and fair dealing, implied under New York law, could not give holders of debentures rights inconsistent with those explicitly set out in indenture, and thus successor corporation and trustee, which performed obligations imposed on them under

original indenture provision governing rights of debenture holders upon merger of issuing corporation, did not violate covenant of good faith and fair dealing.

19. Contracts—312(1)

Under New York law, implied covenant of good faith and fair dealing is breached only when one party to contract seeks to prevent its performance by, or to withhold its benefits from, other party, and mere exercise of one's contractual rights, without more, cannot constitute such breach.

20. Corporations—473

Successor corporation, which properly performed obligations imposed under original indenture provision governing conversion rights of holders following merger, could not have breached fiduciary duty of good faith and fair dealing in connection with offering conversion only into cash.

21. Corporations—473

Trustee under indenture agreement had no fiduciary duty to do anything other than that which it in fact did in issuing supplemental indenture following merger of issuing corporation where execution by trustee of supplemental indenture fully protected legitimate rights of debenture holders under original indenture.

22. Securities Regulation—117

As part of 10b-5 case, plaintiff must allege and prove that defendants acted with "scienter," which is

mental state embracing intent to deceive, manipulate, or defraud. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

23. Securities Regulation—117

In context of private action for money damages brought under Section 10(b) and Rule 10b-5, requirement that plaintiff prove scienter is satisfied by proof that defendants acted with severe recklessness; however, severe recklessness is limited to those highly unreasonable omissions and misrepresentations involving not merely simple or even inexcusable negligence but extreme departure from standards of ordinary care and presenting danger of misleading buyers or sellers which is either known to defendant or is so obvious that defendant must have been aware of it. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

24. Securities Regulation—117

Issuing corporation, successor corporation, and trustee under indenture agreement could not be liable on debenture holders' 10b-5 claim for allegedly engaging in fraudulent scheme to deny holders their rights to convert into common stock following merger where holders established, at best, simple negligence by issuer, by successor, and by trustee in failing to disclose, in prospectus and other sales materials, workings of indenture provision governing holders' conversion rights in event of merger. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

25. Securities Regulation—117

Issuing corporation, successor corporation, and trustee under indenture agreement could not be liable, under Rule 10b-5, for allegedly scheming to defraud debenture holders of their right to convert debentures into common stock following merger by substituting right to convert into cash where debenture holders received, under supplemental indenture, all to which they were contractually entitled under original indenture. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

26. Securities Regulation—60

Section 10(b) and Rule 10b-5 reach only conduct involving manipulation or deception. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. §78j(b).

John Andrew Martin, Dallas, Tex., Hugo L. Black, Jr., Thomas H. Seymour, Kenney, Nachwalter & Seymour, Miami, Fla., for plaintiffs-appellants.

Ernest E. Figari, Jr., David P. Seikel, Dallas, Tex., for Rockwell Intern. Corp., Collins Radio Co., Anderson, Bateman, Booth, Willard F. Rockwell, Jr., Roodhouse, Beall, Cattoi, Fulgham, Martin, Erickson, Drick and Raff.

William B. West, III, Dallas, Tex., for U.S. Trust Co. of New York.

John F. Egan, New York City, for U.S. Trust Co. of New York.

Donald L. Strauber, New York City, for Rockwell Intern. Corp.

Terry Thompson, Edwin D. Scott, New York City, for William C. Hubbard.

James K. Manning, Brown, Wood, Ivey, Mitchell & Petty, New York City, for Brown, Wood, Ivey, Mitchell & Petty.

William J. Fitzpatrick, Atty., New York City, for Securities Industry Assoc.

Stanley T. Kaleczyc, Jr., National Chamber Litigation Center, Inc. Washington, D.C., for Chamber of Commerce of U.S.A.

Leonard Joseph, Dewey, Ballentine, Bushby, Palmer & Wood, New York City, for Donaldson, Lufkin & Jenrett, Inc., et al.

William H. Smith, American Bankers Assoc., Washington, D.C., for American Bankers Assoc.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, Chief Judge, BROWN, COLEMAN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT,

ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, and WILLIAMS, Circuit Judges.

RANDALL, Circuit Judge:

This case, which is before us for rehearing en banc, turns on the construction of an indenture dated as of January 1, 1967 (the "Indenture"). The original parties to the Indenture were Collins Radio Company, an Iowa corporation ("Collins"), and The Chase Manhattan Bank (National Association), a national banking association ("Chase"). The Indenture governed the terms of $40,000,000 principal amount of 4⅞% Convertible Subordinated Debentures due January 1, 1987 (the "Debentures"), which were issued by Collins in January 1967. By means of a supplemental indenture executed in May 1970, United States Trust Company of New York, a New York corporation (the "Trust Company"), succeeded Chase as Trustee under the Indenture.

The events that triggered this lawsuit occurred in the fall of 1973, when Rockwell International Corporation, a Delaware corporation ("Rockwell"), acquired Collins in a cash merger. The central question in the case is this: In what form did the conversion rights of the holders of the Debentures survive the merger under the terms of the indenture?

David Broad brought this class action on behalf of himself and all others who at the time of the merger were holders of the Debentures. He sued Rockwell,

Collins, the controlling persons of both,[1] and the Trust Company, alleging that the defendants breached the terms of the Indenture, breached their respective fiduciary duties, and violated various provisions of the federal securities laws. The district court granted a directed verdict in favor of the defendants at the close of Broad's case-in-chief, holding that (1) the defendants' interpretation of the Indenture and their actions in accord with that interpretation were correct and nonactionable as a matter of state law, and (2) for a number of reasons, no reasonable jury could have found violations of the federal securities laws based on the evidence Broad had adduced at trial. A panel of this court affirmed as to the directed verdict on the federal securities counts, but reversed and remanded on the pendent state-law claims; a majority of the full court, however, vacated the panel's decision under Fifth Circuit Local Rule 17 and ordered that the appeal be reheard en banc. *Broad v. Rockwell International Corp.*, 614 F.2d 418, *vacated and rehearing en banc granted*, 618 F.2d 396 (5th Cir. 1980).

On rehearing en banc, we agree with the panel that the district court acted properly in directing a verdict on the federal securities claims, although we reach that conclusion on narrower grounds than those relied upon by the panel. We disagree, however, with the panel's construction of the Indenture, and hold instead that the district court properly construed that

---

[1]The liability Broad would seek to impose on each of these controlling persons appears to be purely derivative in nature. We therefore refer to only the corporate defendants throughout the remainder of the opinion, and our disposition of the claims against the corporate defendants necessarily includes within its scope the claims against the individual defendants.

document's provisions. Accordingly, for the reasons set out herein, we affirm the judgment of the district court.

I. EVENTS LEADING TO THIS APPEAL

A. The Factual Background to This Litigation

In reviewing the trial court's granted of a directed verdict at the close of Broad's case-in-chief, we use the familiar standard articulated in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc).[2] Viewed in the light most favorable to Broad, the following is a general

---

[2]We held in *Boeing* as follows:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the

outline the relevant facts adduced prior to the directed verdict; more detail is provided as necessary throughout the opinion.[3]

In January 1967, Collins issued and sold to the public $40,000,000 aggregate principal amount of Debentures. The Debentures bore interest at the rate of 4⅞% per year and matured on January 1, 1987, unless sooner redeemed by Collins. They were convertible, at the option of the holders thereof, into the common stock of Collins ("Collins Common Stock"), which had a par value of $1 per share. The Debentures were offered to the public through an underwriting syndicate managed by two New York investment banking firms—Kidder, Peabody & Co. Incorporated and White, Weld & Co.

At the time the Debentures were marketed in 1967, Collins was a prosperous enterprise chiefly engaged in the development and production of radio communications and aircraft navigation equipment. The

---

(Footnote 2 Continued)

> Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

411 F.2d at 374-75 (footnote omitted). *Accord, Dwoskin v. Rollins, Inc.*, 634 F.2d 285, 289 (5th Cir. 1981) (employing this standard in reviewing directed verdict granted on ground that plaintiff had failed to raise a jury question on scienter in suit based on Rule 10b-5). Almost all of the material facts in this case are undisputed, although the parties differ considerably in the legal characterization they would have us place on those facts.

[3] In our discussion of the fact, we draw to some extent on the language of the panel opinion, 614 F.2d at 422-24.

proceeds of the public offering, like the proceeds of previous offerings of debentures by Collins in the 1960s, were to be used to finance capital additions and to increase working capital for the expansion of Collins' business. During the period immediately before the offering of the Debentures, Collins Common Stock had traded on the New York Stock Exchange for approximately $60 per share. If a holder of Debentures were to choose to exercise his conversion privilege, Collins would issue to him, in exchange for his Debentures, one share of Collins Common Stock for every $72.50 principal amount of Debentures. This meant that conversion might become economically attractive if the market price of Collins Common Stock rose more than $12.50 over its market price of $60 per share at the time of the offering of the Debentures.

Beginning in its 1969 fiscal year, however, Collins suffered a series of economic reversals, manifested by declining sales and reduced income. In the midst of a generally declining stock market, Collins' fading fortunes did not go unnoticed: during the 1971 calendar year, Collins Common Stock never traded on the New York Stock Exchange at more than $21 per share, and in the fourth quarter of that year it was selling for as little as $9.75 per share. Collins was on the verge of bankruptcy. It was at that point, however, that Collins became affiliated with Rockwell.

In August 1971, Collins shareholders overwhelmingly approved the terms of an agreement by which Rockwell invested $35,000,000 in Collins, receiving in return two new series of Collins securities: preferred stock that was convertible into Collins class A common stock, and

warrants to purchase additional class A common stock. As sole holder of the new issue of preferred stock, Rockwell also received, and soon exercised, the right to elect a majority of Collins' board of directors. In addition to the $35,000,000 investment, Rockwell provided some managerial assistance to Collins and guaranteed up to $20,000,000 in borrowings by MCI Leasing, Inc., a customer of Collins, so that MCI could order up to $33,000,000 worth of equipment from Collins. Rockwell indicated that while it did not, as of July 1971, propose that there be merger between the two companies, it would not rule out the possibility that future events might make such a proposal attractive to it.

By 1973 such a proposal had evidently become attractive. In August of that year, Rockwell made a tender offer for Collins Common Stock, offering the shareholders $25 cash per share tendered. As part of the offer, Rockwell disclosed that if the offer were successful, it intended to propose a merger of Collins into Rockwell at that same figure of $25 per share. The tender offer was successful, and by October 1, 1973, Rockwell had acquired approximately 75% of the outstanding Collins Common Stock.

In accordance with the intentions it had stated prior to the tender offer, Rockwell and Collins duly entered into an Agreement and Plan of Merger dated as of October 8, 1973 (the "Merger Plan"), which provided that on the effective date of the merger, each holder of Collins Common Stock (other than Rockwell itself, of course) would receive $25 per share in cash upon surrender of the certificates evidencing such stock. Under Iowa law (which was applicable because Collins was an Iowa corporation), the approval of a majority of the Collins

board of directors and of the holders of two-thirds of the outstanding shares of each class of Collins stock was required for a merger. As a result of the tender offer, Rockwell itself controlled more than two-thirds of the outstanding Collins Common Stock; but it did not hold the 90% needed under Iowa law to effect a "short-form" merger in which no vote of the shareholders would be necessary. As a result, a vote of the Collins shareholders was taken on November 2, 1973, and the Merger Plan was approved by the vote of the holders of approximately 84.5% of the Collins Common Stock. The merger was effected on November 14, 1973, and from that date until the present Collins has operated only as an internal division of Rockwell.

These events, of course, were not without effect upon the Debentures. After they were first offered to the public in 1967, Debentures in the principal amount of $1000 at times traded at almost $60 above face value. Later, however, as Collins' business fortunes diminished and the price of Collins Common Stock slumped dramatically, the market price of the Debentures fell as well. The only class member to testify at trial, William E. Barnes, testified that from 1969 through August 1973 he invested $194,000 in Debentures with an aggregate principal amount of $320,000; though the first Debentures he purchased were selling at well above their principal amount, the Debentures he later purchased were discounted to well below $600 per $1000 principal amount, and his average purchase price

for all of his Debentures was about $606 for each $1000 principal amount of Debentures.[4]

The first significant activities of the Trust Company, other than its performance of routine administrative duties as substitute Trustee under the Indenture, came in the fall of 1973 when the Trust Company was called upon to consider whether the terms of a proposed supplemental indenture to be executed by Rockwell, as successor by merger to the obligations of Collins under the Indenture, complied with the terms of the Indenture. Under that supplemental indenture, Rockwell would assume in full all of the obligations of Collins under the Indenture, including the obligation to pay interest, and eventually to repay the principal, on the outstanding Debentures until they either were redeemed or matured in 1987. With regard to the conversion feature of the Debentures, the proposed supplemental indenture provided that each holder of a Debenture would have the right to convert his Debenture into the amount of cash that would have been payable to him under the Merger Plan had he converted his Debenture into Collins Common Stock immediately prior to the merger. In other words, a holder of Debentures could, at any time while his Debentures were outstanding, choose to convert them into exactly that which he would have received

---

[4]Mr. Barnes, a rural mail carrier from Welder, Texas, admitted that in saving Collins from bankruptcy, Rockwell had performed a "verified miracle." He also conceded that as of July 1977, his Debentures were trading at about $775 per $1000 in principal amount, providing him with a net paper profit of more than $50,000 in addition to the roughly $15,000 in interest from the Debentures that he had received. The interest, of course, was paid on the face value of the Debentures rather than on their discounted market value.

had he converted immediately before the merger and participated therein as a holder of Collins Common Stock. Because the holders of Collins Common Stock received no common stock in the merger, the holders of Debentures would have no right to convert into common stock—either of Collins (who would have no more common stock) or of Rockwell—after the merger. Rockwell's view of its post-merger obligations under the Indenture was shared by its counsel (the New York firm of Chadbourne, Parke, Whiteside & Wolff), and by Collins and Collins' counsel (the Los Angeles firm of Gibson, Dunn & Crutcher).

In order to determine whether the proposed terms of the supplemental-indenture complied with the terms of the Indenture, the Trust Company engaged the New York law firm of Curtis, Mallet-Prevost, Colt & Mosle. Two partners in that firm—John P. Campbell and John N. Marden—undertook a review of the Indenture and the applicable law. Campbell and Marden took the position in September 1973 that a court might in the future find that the intent of the parties at the time the Indenture was executed was that *the right to convert into common stock would survive a merger of Collins into another company,* and that every holder of Debentures would have the right to convert his Debentures into common stock of the surviving company as long as the Debentures remained outstanding. Since the Indenture required that Rockwell assume all of Collins' obligations under the Indenture in the event of a merger, Campbell and Marden contended that Rockwell would be bound to agree in a supplemental indenture with terms providing for a conversion right of the Debentures into the common stock of Rockwell ("Rockwell Common Stock"), unless Rockwell could obtain the consent of each holder of

Debentures that such a right could be extinguished. Furthermore, they contended, Rockwell's voting control of Collins prior to the merger imposed upon Rockwell and the directors of Collins a fiduciary obligation to the holders of Debentures.

The record indicates that discussions and exchanges of memoranda and drafts of opinions between counsel for Rockwell and Collins on the one hand, and counsel for the Trust Company on the other hand, continued for several weeks, and their disagreement was heated. There is also evidence in the record indicating that Rockwell exerted considerable pressure on the Trust Company to change its position, threatening the withdrawal of certain other business from the Trust Company and possible litigation if the Trust Company blocked the merger by refusing to execute a supplemental indenture. At something of an impasse with counsel for Rockwell, Campbell advised the Trust Company on September 18, 1973, that it could follow any of four alternative courses of action: (1) the Trust Company could decline to execute a supplemental indenture (thus blocking the Collins-Rockwell merger) unless the supplemental indenture provided for a right to convert into Rockwell Common Stock; (2) the Trust Company, as a policy decision, could refuse to take a position as to the rights of the holders of the Debentures after the merger, relying on the provisions in the Indenture and in the supplemental indenture by which Rockwell would indemnify the Trust Company from liability in any lawsuits that might later be brought; (3) the Trust Company could resign as Trustee under the Indenture; or (4) the Trust Company could seek a declaratory judgment with respect to the conversion rights of the holders of Debentures after the merger. Campbell

recommended alternative (2), and the Trust Company ultimately followed that recommendation.

Thus, on October 11, 1973, Rockwell sent a letter to the holders of the Debentures to notify them of the proposed merger between Rockwell and Collins. The text of the letter read as follows:

> Rockwell International Corporation ("Rockwell") has proposed the merger of Collins Radio Company ("Collins") into Rockwell. Pursuant to the terms of the proposed merger Rockwell would assume all of Collins obligations, including Collins obligations under the Indenture, dated as of January 1, 1967, relating to Collins 4⅞% Convertible Subordinated Debentures due January 1, 1987 (respectively the "Indenture" and the "Debentures").
>
> Rockwell and United States Trust Company of New York, the Successor Trustee under the Indenture (the "Trustee"), intend to execute a Supplemental Indenture to the Indenture on or about November 1, 1973. This Supplemental Indenture is to be effective on the effective date of the merger of Collins into Rockwell and will provide for the assumption by Rockwell of the due and punctual payment of the principal of the interest on the Debentures and the due and punctual performance and observance by Rockwell of all the terms, covenants and conditions of the Indenture. *The Supplemental Indenture does not alter or impair the rights accorded under the Indenture to holders of*

the Debentures and does not change the provisions of the Indenture.

With regard to the conversion rights of holders of the Debentures, counsel for Rockwell and counsel for Collins have each advised that *under Section 4.11 of the Indenture*, the Section that provides for the adjustment of conversion rights upon a merger or similar event, *a holder of a Debenture, upon effectiveness of the proposed merger, would have the right, until the expiration of the conversion right of such Debenture, to convert the Debenture into the amount of cash that would have been payable with respect to the number of shares of Collins Common Stock into which the Debenture could have been converted immediately prior to effectiveness of the proposed merger.* The current conversion price of $72.50 entitles the holder of a $1,000 Debenture to convert it into 13.79 shares of Collins Common Stock. Pursuant to the merger each share of Collins Common Stock outstanding immediately prior to the merger (other than those held by Rockwell) is to be converted into $25. *Thus, after the merger, a $1,000 Debenture will be convertible into $344.75 in cash.*

The Trustee has advised that it does not take a position with regard to this letter or the statements herein, and that it has consulted with its counsel who confirmed that as Trustee it should not take a position with regard thereto.

> Neither the proposed merger nor the proposed Supplemental Indenture requires action by the Debentureholders. Upon effectiveness of the merger, the Debentures will represent indebtedness of Rockwell. You will not need to surrender or exchange your Debentures for new debentures.

(Emphasis added.) The letter was signed by both the president and the chairman of the board of Rockwell.[5]

According to Campbell's testimony by deposition, at some point prior to the merger he abandoned his interpretation of the Indenture in favor of the interpretation advanced by counsel for Rockwell and

---

[5]This letter touched off a wave of inquiries by holders of Debentures about the status of their conversion rights. Some apparently were of the impression that Rockwell's October 11 letter did not foreclose the possibility that the Debentures would be convertible at the holders' option into either cash or Rockwell Common Stock. Others contended that Rockwell could not "eliminate" their right to convert into Collins Common Stock without paying them new consideration or providing a conversion right into Rockwell Common Stock. Many holders of Debentures requested copies of the Indenture, which were provided. Some requested copies of the opinions from the respective counsel for Rockwell, Collins, and the Trust Company, but those requests were refused. The Trust Company did, however, initially indicate to a number of holders of Debentures that it disagreed with Rockwell's interpretation of the Indenture without indicating to Rockwell that it was doing so. When Rockwell accused the Trust Company of "fomenting litigation," Campbell replied that the Trust Company had withheld from Rockwell its answers to the letters on the basis of his advice as to the Trust Company's fiduciary obligation to represent the holders of debentures.

Collins. When asked to explain why he had abandoned his earlier position, Campbell answered as follows:

> It started out with a premise that we must find law to support the position which [Broad] now assert[s]. I made, I thought, a very good try and had almost convinced myself by starting with the conclusion and working back to get the authority. It was a good dog, but it wouldn't hunt. I fell down.

Other evidence in the record, however, indicates that as late as January 1974, Campbell continued to see some validity in his earlier view.

Nonetheless, on November 14, 1973, the merger was effected, and a supplemental indenture between Rockwell and the Trust Company was executed, effective as of November 1, 1973. The supplemental indenture provided that Rockwell would assume Collins' obligations on the Debentures. Specifically, it provided that after the merger, the holders of the Debentures had the right to convert the debentures into that which they would have received in the Merger Plan had they converted immediately before the merger's effective date. In accordance with the October 11 letter, Rockwell has consistently interpreted this to mean that the Debentures could be converted into cash, but not into the common stock of either Rockwell or Collins; the conversion rate was $344.75 in cash for each $1000 in principal amount of Debentures surrendered.

B. Action in the District Court

Plaintiff David Broad, a holder of Debentures at the time of the merger, filed this class action in federal court against Rockwell, Collins, the controlling persons of both, and the Trust Company. Broad alleged two claims under the federal securities laws—specifically, under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b) (1976), and under Rule 10b-5 promulgated by the Securities and Exchange Commission thereunder, 17 C.F.R. §240.10b-5 (1980).[6] His two federal claims were, as a logical matter, urged essentially in the alternative. His main claim was that the defendants had collectively engaged in a fraudulent scheme to deny the holders of debentures their rights under the Indenture to convert into common stock at any time until the Debentures matured in 1987 or were sooner redeemed. In the alternative, he claimed that at the time the debentures were issued in 1967, the defendants had omitted to disclose a material fact with regard to the terms of the Debentures—specifically, that under the terms of the Indenture, the right to convert into Collins Common Stock could, in the event of a merger, be replaced with the right to convert into only that which the holders of Collins Common Stock received in the merger.[7]

---

[6]These claims were within the district court's subject-matter jurisdiction under §27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa (1976), and under 28 U.S.C. §§1331 and 1337 (1976).

[7]Broad has from time to time resisted the characterization of his Rule 10b-5 claims as being in the alternative, but we see no way in which they can logically be reconciled.

Broad also alleged a number of pendent state-law claims.[8] Essentially, these claims were that all the defendants had breached the Indenture; that all the defendants had breached the covenant of good faith and fair dealing implied into the Indenture by law; that Rockwell had breached a fiduciary duty which it owed the holders of the Debentures by virtue of its control of both parties to the 1973 merger; and that the Trust Company had breached its fiduciary duty as Trustee for the holders of the debentures. The argument that the defendants had breached the Indenture was also urged in the alternative: Broad first contended that the Indenture unambiguously provided for a right to convert into common stock that would survive any merger. But if not unambiguously susceptible to the interpretation he urged in his first argument, Broad contended that the Indenture was at the least ambiguous, and that the intent of the parties at the time the Indenture was executed was that the right to convert into common stock would survive any merger.

Broad sought three alternative forms of relief for the class: (1) "restoration" of the option to convert into Rockwell Common Stock (since no Collins Common Stock existed after the merger); (2) a judgment for the difference between the redemption price (103¼% of principal amount) and the market value of the Debentures as of the date of judgment, with interest from the date of the merger; or (3) redemption at 103¼% of the principal amount of the Debentures.

---

[8]These claims were within the district court's Subject-matter jurisdiction under the pendent jurisdiction doctrine of *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

At the close of Broad's case-in-chief on the third day of trial, the district court granted the defendants' motions for a directed verdict on all of these claims. With regard to the claim that the defendants omitted to disclose a material fact in connection with the issuance of the Debentures in 1967 and subsequent to that time, the court held that the record was devoid of evidence from which reasonable persons could find that any defendant acted with scienter, even if recklessness were sufficient to satisfy the scienter requirement under Rule 10b-5. Additionally, the court held that the Trust Company had no duty to disclose this allegedly omitted fact since it had no connection with the Debentures until 1970. With regard to the claim that the defendants had schemed to deprive the holders of the Debentures of their conversion rights, the court held that any of three grounds justified the directed verdict: first, there was no evidence from which reasonable men could find that the defendants acted with scienter, even if reckless conduct were sufficient to satisfy the scienter requirement; second, Rockwell correctly construed the Indenture in 1973 and fully respected the rights of the holders of the Debentures in the merger; and last, the wrongs alleged in this claim did not occur in connection with a purchase or sale of a security, since the holders of the Debentures still held their Debentures after the merger.

With regard to the state-law claims, the court held that even if Broad's claim that the Indenture was

ambiguous had been timely made,[9] that argument was unfounded: the Indenture was unambiguous, and its terms were as Rockwell contended. The court held that its ruling on this question of law foreclosed Board's breach of contract claim, since it was undisputed that Rockwell's conduct was in full compliance with the court's interpretation of the Indenture. The court further held that Rockwell's compliance with the Indenture also foreclosed any breach of fiduciary duty claims, and that the record was devoid of evidence from which reasonable persons could conclude that Rockwell acted with bad motives. As to the Trust Company, the court held that it had only those duties specified in the Indenture and in the Trust Indenture Act of 1939 (the "Trust Indenture Act"), 15 U.S.C. §§77aaa-77bbbb (1976), and that it had not breached any of those duties.

As an alternate ground for the directed verdict on all counts, the court held that the record was devoid of evidence from which reasonable persons could find actual damages, and that none of the equitable remedies requested by Broad would have been appropriate even if he had prevailed on one or more of his theories of liability.

---

[9]The claim that the Indenture was ambiguous was actually not included in Broad's complaint, and neither did it appear in the summary of the parties' contentions that was filed in lieu of a pretrial order. Nonetheless, since the district court did not specifically hold that such an argument had been waived, but instead reached the merits of the ambiguity argument, and since the panel opinion has reviewed the district court's ruling on that argument, we too will include it in our discussion of the case.

C. The Panel Opinion

On appeal, a panel of this court affirmed the directed verdict on the federal securities claims, but reversed and remanded on the state-law claims. With regard to the Rule 10b-5 claim that the defendants had omitted to disclose in 1967 and thereafter until the merger the possibility that the right to convert into common stock would be altered in the event of a merger, the panel agreed with the district court that there was no evidence in the record from which reasonable persons could find that any of the defendants had acted with scienter. 614 F.2d at 439-41. With regard to the Rule 10b-5 claim that in 1973 the defendants had engaged in a fraudulent scheme to deprive the holders of the Debentures of their rights to convert into Collins Common Stock, the panel agreed with the district court that as regards the holders of the Debentures there had been no "purchase or sale" of a security, rejecting Broad's argument that the loss of the conversion right was analogous to a constructive or forced sale. *Id.* at 435-39. Having agreed with the district court that there could be no liability on the federal securities claims, the panel declined to discuss the district court's alternative ground for the directed verdict on those claims—that the record was devoid of evidence from which reasonable persons could find actual damages. *Id.* at 439 n.24.

The panel parted ways with the district court on the question of the Indenture's ambiguity, however, holding that the Indenture was ambiguous as a matter of law because it did not speak "with the requisite clarity" to the post-merger conversion rights of the holders of the Debentures. That being the case, the panel held that the jury should have been allowed to

determine whether Rockwell and the Trust Company had acted in accord with the intent of the parties at the time the Indenture was executed. *Id.* at 426-29. Further, since under New York law every contract contains an implied covenant of fair dealing, the panel held that the jury should have been allowed to determine whether the defendants had dealt fairly with the holders of the Debentures. *Id.* at 429-30.

With regard to the fiduciary duty claims, the panel held that Rockwell's duties to the holders of the Debentures should be considered to have been met if on remand the jury were to find either (1) that Rockwell complied with the intent of the parties at the time of the execution of the Indenture, or (2) that despite its breach of the Indenture, Rockwell acted in good faith based on a reasonable understanding of the Indenture. *Id.* at 430-31. As to the Trust Company's fiduciary duty, the panel held that the Trust Indenture Act imposed no fiduciary obligations in addition to those imposed by applicable state law. *Id.* at 431-32. Returning to state law, the panel held that the Trust Company was cloaked with a fiduciary duty to the holders of the Debentures under New York law, and that it was for the jury to decide whether the Trust Company had violated that duty. *Id.* at 432.

On the question of the measure of damages applicable to the state-law claims, the panel agreed with the district court that equitable relief such as redemption of the Debentures or restoration of the common stock conversion privileges would be inappropriate. But the panel held that if on remand the jury found that the defendants had breached the Indenture, the district court could apply the default provisions set out in the Indenture,

which provided that the principal and accrued interest on the Debentures would be accelerated to be due and payable immediately as of the time of the default. *Id.* at 433.

II. CONSTRUING THE INDENTURE

A. The Nature of the Contract

Because the construction of the Indenture is basically a question of contract law, it is perhaps worthwhile to discuss briefly the way in which this type of contract operates, and the reasons why such contracts must be so long and detailed. Convertible debentures represent one of many means through which business enterprises obtain capital from investors for long periods of time. Most such means can be classified as either "debt securities" or "equity securities," but convertible debentures are something of a hybrid—basically a debt security, but with equity features.

In part because of the differing treatment of debt and equity securities both by statute and at common law, debt securities are, to a much larger degree than is true of equity securities, creatures of contract law.[10]

---

[10]The American Bar Foundation's *Commentaries on Indentures* make the following comments on the distinctions between long-term debt financing and equity financing:

> In general, funds needed for financing private corporate enterprises are obtained in exchange for interests of two essentially different kinds: (1) those of the "equity" owners or shareholders, whose securities represent certain rights of ownership, control and profit accompanied by a relatively greater risk of loss, and (2) those of the "lenders," who

As a result, the written contracts that govern the rights and obligations of debt securities are often long and complex, for those contracts attempt to anticipate

---

(Footnote 10 Continued)

> classically forego control and profit in return for periodic payments (interest and often sinking fund) without regard to profits and for repayment of principal at a fixed date, ahead of the equity owners.
>
> The most obvious and important characteristic of long-term debt financing is that the holder ordinarily has not bargained for and does not expect any substantial gain in the value of the security to compensate for the risk of loss. This is not true of a debt security which is convertible into an equity security, and it is not entirely true of a debt security purchased for much less than its principal amount. With these exceptions, however, the significant fact, which accounts in part for the detailed protective provisions of the typical long-term debt financing instrument, is that the lender (the purchaser of the debt security) can expect only interest at the prescribed rate plus the eventual return of the principal. Except for possible increases in the market value of the debt security because of changes in interest rates, the debt security will seldom be worth more than the lender paid for it, provided he bought it at approximately its face amount. It may, of course, become worth much less. Accordingly, the typical investor in a long-term debt security is primarily interested in every reasonable assurance that the principal and interest will be paid when due.
>
> The second fundamental characteristic of long-term debt financing is that *the rights of the holders of the debt securities are largely a matter of contract.* There is no governing body of statutory or common law that protects the holder of unsecured debt securities against harmful acts by the debtor except in the most extreme situations. Short of bankruptcy, the debt security holder can do nothing to protect himself against actions of the borrower

and deal with in advance all possible contingencies that might call into question the operation of those rights and obligations. In the case of debentures, those contractual rights are set forth in a document that is separate from the debt instrument itself. That document, whose terms are incorporated by reference on the face of the debt instrument, is commonly called an indenture."

(Footnote 10 Continued)

> which jeopardize its ability to pay the debt unless he takes a mortgage or other collateral or establishes his rights through contractual provisions set forth in the debt agreement or indenture.
>
> Finally the long-term debt may be held by many holders, all of whom expect to be treated on a parity. Here, again, there is no body of law governing the procedures by which the holders of debt securities may take collective action. These procedures, as well as the mechanics of transfer and exchange of the securities, are matters of contract which are usually set out in the indenture and sometimes in the debt instrument. Thus the situation is quite unlike that involved in the issuance of stock where various substantive rights and procedural matters are in effect incorporated in the certificate of incorporation of the issuer by operation of the applicable corporation laws.

American Bar Foundation, Commentaries on Indentures 1-2 (1971) (emphasis added).

"The modern form of debenture indenture was originally adapted from a different form of negotiable security:

> The first debt securities termed "debentures" did not involve a trustee. They were, in effect, promissory notes issued in quantity with no underlying indenture or

The debt represented by the debenture is typically not secured by specific assets of the issuer,[12] and is frequently subordinated to senior indebtedness of the

---

(Footnote 11 Continued)

> comparable agreement. Prior to World War I, draftsmen were challenged with the task of creating debentures as to which all holders would be on a parity and protected by adequate covenants and which would nevertheless be negotiable. The solution was to take the corporate mortgage indenture form, delete the conveyancing and other provisions relating to the collateral, and insert covenants designed to protect the debentureholders. These protective covenants were designed to prevent the borrower from placing other creditors in a position senior to the debentureholders, indulging in excessive borrowing or otherwise jeopardizing its ability to meet the obligations on the debentures. Other provisions of an administrative nature remained much the same in a debenture indenture as those in a mortgage indenture. The result is a form of instrument which offers great flexibility for adaption to a particular transaction.

Id. at 7 (footnote omitted).

[12]This feature distinguishes debentures from corporate bonds:

> There is no inherent or clearly established distinction between "bonds" and "debentures." . . . The terms "bond" and "debenture" came into use in the United States without any definite or consistent legal connotation and to some extent are still intermingled. Financial men refer to the "bond market" as including all forms of long-term debt securities . . . . [Under preferred usage], *"debenture" means a long-term debt security which is not secured,* and "bond" (except with respect to governmental or other public corporation securities) means a long-term debt security which is secured by a lien on some or all of the

issuer. It is usually the case that the debentures of a given issue are held by a great number of parties, and for this reason it was found desirable, as the modern concept of debentures developed, that the indenture designate a corporate trustee to protect the rights of the many holders of the debentures and to perform certain ministerial tasks connected with the normal operation of the debentures. Thus, although the debts created by the debentures run directly from the issuer

---

(Footnote 12 Continued)

> assets of the borrower. Most recent issues conform to this usage.

Id. at 7 n.3 (emphasis added). Debentures are also distinguishable from long-term notes:

> There is no basic or historically established distinction between "debentures" and "notes." There has emerged, however, a clear and useful distinction in modern usage. According to this usage, in the area of long-term debt securities, a security is properly termed a "note" when it is not issued pursuant to an indenture and there is no indenture trustee. However, it may be, and usually is, issued to one or a few purchasers pursuant to a purchase or loan agreement which, in addition to provisions dealing with the terms of purchase, includes many of the contractual rights found in an indenture. In today's nomenclature *the security is properly termed a "debenture" when it is issued pursuant to an indenture and there is an indenture trustee.*

Id. at 8 (emphasis added). These distinctions are, of course, merely generalizations; as such, they do not hold true in all cases. For example, long-term notes may be issued pursuant to an indenture, but without a trustee because they are to be purchased by a comparatively small number of institutional investors.

to the holders, the contractual rights conferred by the indenture run from the issuer to the trustee for the benefit of the holders of the debentures.[13] In today's usage, then, a security is generally termed a "debenture" when it is a long-term unsecured debt security, issued pursuant to an indenture and with an indenture trustee.

---

[13]The function of the trustee is explained by the historical context through which debentures developed:

> Even though the debenture indenture creates no lien, it was found desirable to retain the trustee. In fact, since 1939 a trustee has been required by the Trust Indenture Act for issues subject to registration under the Securities Act of 1933. The fact that the debenture indenture trustee does not hold title to, or have possession of, any property has caused some persons to regard its position as an anomally and the title "trustee" is a misnomer. As a matter of law, however, it is well established that the corpus of a trust may consist of contractual rights and that one who holds contractual rights for the benefit of others may be a trustee. Accordingly, the title "trustee" is appropriate in this situation because, although the debts created by the debentures run directly from the issuer to the holders, the contractual rights conferred by the indenture run from the issuer to the trustee for the benefit of the holders.
>
> Apart from legal semantics, the role performed by the debenture indenture trustee is a practical necessity whenever there are any substantial number of holders of the debt securities. Some of the most useful functions customarily performed by the trustee are not performed in its capacity as trustee, but rather as transfer agent and paying agent. Nevertheless, the protection to debentureholders accorded by the pure trustee functions is of significant value.

Id. at 7-8.

Not all debentures are "straight debt securities." The Debentures at issue in this case are examples of "convertible debentures," which exhibit characteristics of both debt and equity securities:

> A convertible debenture is one which gives the holder the right to exchange his debenture for other securities of the [issuing] Company, usually for shares of common stock and usually without payment of further consideration. The conversion right, although set forth in the debenture and in the indenture, is separate and distinct from the debt evidenced by the debenture. As a separate right it has its own ascertainable value.

American Bar Foundation, Commentaries on Indentures 522-23 (1971) (footnotes omitted) (hereinafter cited as *Commentaries*). The fact that a debenture is convertible into equity securities is an important feature, and therefore the terms under which the debenture may be converted are usually summarized on the fact of the debenture itself. All convertible debentures, however, purport only to *summarize* the salient provisions of the conversion terms on the face of the instrument; as is the case with the other complicated provisions that govern the duties of the issuer and trustee, the terms of redemption, and so forth, many of the details concerning the debenture's convertibility must be set forth instead in the governing indenture.

The indenture will specify a rate at which the debentures can be converted into equity securities (usually common stock). This is often expressed in terms of a "conversion price," which may be conceptualized as

the price at which a share of stock may be "purchased" by the holder of the debenture in exchange for the surrender of indebtedness under the debenture. For example, if the conversion price for a debenture in the principal amount of $1000 is $50, the holder of the debenture is entitled to convert his $1000 debenture into a total of 20 shares of common stock.

The discussion above only briefly describes the manner in which convertible debentures function. Given this,

> it is not surprising that corporate indentures are lengthy and complex. There is much that must be covered by the contract set forth in the indenture. But it is also true that much of what has to be covered is, or could be, virtually the same for all indentures. These are the provisions that are commonly referred to as "boiler-plate," e.g., provisions regulating the issuance, authentication, transfer and exchange of securities; provisions establishing the procedures for collective action by the securityholders; and provisions prescribing the duties of the trustee. These, and certain others, are provisions which have been stated in many different ways in various indentures. Since there is seldom any difference in the intended meaning, such provisions are susceptible of standardized expression. The use of standardized language can result in a better and quicker understanding of those provisions and a substantial saving of time not only for the draftsmen but also for the parties and all others who must comply with or refer to the indenture,

> including governmental bodies whose approval of authorization of the issuance of the securities is required by law.

Commentaries at 3. Not least among the parties "who must comply with or refer to the indenture" are the members of the investing public and their investment advisors. A large degree of uniformity in the language of debenture indentures is essential to the effective functioning of the financial markets: uniformity of the indentures that govern competing debenture issues is what makes it possible meaningfully to compare one debenture issue with another, focusing only on the business provisions of the issue (such as the interest rate, the maturity date, the redemption and sinking fund provisions and the conversion rate) and the economic conditions of the issuer, without being misled by peculiarities in the underlying instruments.

B. Conversion Rights at Common Law and the Need for Contractual Antidilution Provisions

In the case at bar, there are specific portions of the Indenture that set out the rights of the holders of the Debentures, and the obligations of the Trustee and issuer, in the event that the issuer is merged into another company. Nonetheless, the common law's treatment of conversion rights upon merger is important in this case in two different respects. First, it must be determined whether the common law provides the holders of the Debentures with rights in addition to the rights that are set out in the Indenture. Second, an understanding of the common law's treatment of conversion rights upon merger explains the historical development of

boilerplate contractual antidilution provisions of the sort found in the Indenture.

[1] The *Commentaries* explain in brief the possible dangers to the conversion rights of the holders of debentures that might attend certain actions by the issuer of the debentures:

> The anti-dilution provisions are designed to preserve the value of the conversion privilege against diminution by certain voluntary corporate acts. For example, if the conversion price is $25 a share at a time when the common stock has a market value of $30 a share, the conversion right is clearly valuable. If the Company should then split its stock 3 for 1, the market price of its shares would be reduced to approximately $10 per share. Thus the value of the right to convert at $25 per share would have been virtually destroyed, by that voluntary corporate action, in the absence of appropriate protective provisions.
>
> Inasmuch as ownership of a convertible debenture does not give the holder the rights of a shareholder, the holder of a convertible debenture would have almost no protection against acts by the Company which would adversely affect the value of the common stock issuable on conversion, such as a split-up of shares, stock dividends, distribution of assets, issuance or sale of other convertible securities, issuance of options, issuance or sale of common stock at prices below the current conversion or market price, *merger*, sale of assets or

> dissolution and liquidation of the Company. Events of this type are customarily described as "diluting" the value of the conversion privilege, and *if protection is desired against such dilution, appropriate provisions must be included in the indenture.*

Commentaries at 527 (1971) (emphasis added; footnote omitted). As justification for the phrase we have italicized above, the *Commentaries* cite *Parkinson v. West End Street Railway Co.*, 173 Mass. 446, 53 N.E. 891 (1899) (per Holmes, J.).

Justice Holmes' decision in *Parkinson* was aptly cited by the authors of the *Commentaries* for the proposition that antidilution protection must be provided by contract if it is to be provided at all, for *Parkinson* holds that there is no such protection at common law. The plaintiff in *Parkinson* held Highland Street Railway bonds that were convertible into Highland's preferred stock. When West End Street Railway acquired Highland "subject to all [of Highland's] duties, restrictions, and liabilities," *id.* at 447, 53 N.E. at 891, the existing holders of Highland's preferred stock received West End preferred stock or preemptive rights thereto in exchange for their Highland stock. West End refused, however, to convert the Highland bonds into West End preferred stock. The Massachusetts Supreme Court denied relief:

> [T]he contract does not prevent the corporation from consolidating with another in such a way as to make performance impossible, any more than it prevents the issue of new stock in such a way as to make performance valueless . . . .

> A consolidation which makes no arrangement for furnishing stock in the new company, and which ends the existence of the old ones, as a general rule may be presumed to put an end to the right of bondholders to call for stock, not because the law has not machinery for keeping such a right alive, but because, not being bound to do so, it has made dispositions which manifestly take no account of it.

Id. at 448-49, 53 N.E. at 892. Thus, according to *Parkinson*, mergers may extinguish all conversion rights, absent explicit contractual provisions to the contrary[14] The same idea is expressed in *Lisman v. Milwaukee, Lake Shore & Western Railway Co.*, 161 F. 472 (C.C.E.D. Wis. 1908), *aff'd mem.*, 170 F. 1020 (7th Cir.), *cert. denied*, 214 U.S. 520, 29 S.Ct. 700, 53 L.Ed. 1065 (1909):

> [I]t would appear that the [issuer] might, in the interest of its stockholders, go out of existence without giving the holder of a convertible bond any just cause of complaint.
>
> . . . In the sale and purchase both railway companies were acting within their strict legal rights to promote the interests of their

---

[14]As Justice Holmes indicated in *Parkinson*, 173 Mass. at 449, 53 N.E. at 892, his two previous opinions in *John Hancock Mutual Life Ins. Co. v. Worcester, Nashua & Rochester Railroad Co.*, 149 Mass. 214, 21 N.E. 364 (1889), and *Day v. Worcester, Nashua & Rochester Railroad Co.*, 151 Mass. 302, 23 N.E. 824 (1890), were not inconsistent with the general principle announced in *Parkinson*, but were instead exceptions to that principle based on peculiar facts, none of which are present in the case at bar.

> respective stockholders. This change of ownership was only one of several vicissitudes liable to happen during 20 years in the life of the corporation, which might render the outstanding option valueless, and still afford no cause of action to the debenture holder. Nothing has taken place which the debenture holders were not bound to anticipate . . . . If [as a result of the consolidation] the hope of speculative venture on the stock market was extinguished, it is damnum absque injuria.

Id. at 477-78.[15]

Broad has cited no persuasive authority which would indicate that the common law of New York or of any other jurisdiction would provide any additional protection for his conversion rights upon merger, other than that protection which might be included in the

---

[15]*See also Kessler v. General Cable Corp.*, 92 Cal.App.3d 531, 539-40, 155 Cal.Rptr. 94, 99-100 (1979); H. Henn, The Law of Corporations 288-89 & n.32 (2d ed. 1970), and sources cited therein. *Cf. Helvering v. Southwest Consolidated Corp.*, 315 U.S. 194, 200-01, 62 S.Ct. 546, 550-51, 86 L.Ed. 789 (1942) (citing *Parkinson* with approval for the propositions that warrantholders' rights are wholly contractual, and that those contractual rights may expire upon consolidation of obligor corporation with another company, in deciding whether warrants exercisable into common stock constituted "voting stock" within the meaning of federal statute providing for tax-free reorganizations); *Welles v. Chicago & Northwestern Railway Co.*, 175 F. 562, 563-64 (2d Cir. 1910) (per curiam) (while option to convert could be exercised within 10 days of payment of common stock dividend, after consolidation neither common stock nor dividend existed and hence option could not be exercised).

Indenture.[16] But the common law cases cited by the parties do shed light on the origin of and need for boilerplate antidilution provisions of the sort at issue here.

As the *Lisman* case points out, holders of debentures were charged at common law with the knowledge that various voluntary corporate actions might dilute—or even render nugatory—the value of their debentures' conversion feature; because dilution was (at least constructively) within their contemplation when they purchased the security, there was no unfairness in denying the holders of debentures any compensation in the event of such dilution. But of course, even before the occurrence of a diluting event, this *risk* of dilution itself significantly diminished the value of the conversion feature. As Justice Holmes noted in *Parkinson*, however, the law does have machinery through which, if the parties so choose, the value of the conversion right may be protected. The draftsmen of indentures may guard against dilution through the insertion of any of three types of special contractual provisions.

The first and most drastic type of provision is the outright prohibition of certain types of voluntary corporate conduct. Such prohibitory covenants are more typically used to protect the value of the debt obligation

---

[16]We leave aside for the moment the question of whether Broad can claim such protection from an implied covenant of fair dealing, as suggested by the panel opinion, 614 F.2d at 429-30. We deal with this issue in part III-A of this opinion, *infra*.

represented by the debenture.[17] But prohibitory covenants may also be used to protect the value of the conversion feature—*e.g.*, by means of an absolute ban on mergers. The efficacy of this means of antidilution protection must be balanced against the loss of business flexibility it means for the issuer. Some sorts of corporate conduct can be limited with little loss of flexibility, but other restrictions may so hamstring the company that they threaten its continued existence.

Happily, there are two less restrictive means of antidilution protection that do not bear such high costs in terms of business flexibility, as the following excerpt from the *Commentaries* indicates:

> In modern convertible debenture indentures it is virtually universal to provide some anti-dilution protection [that provides for the adjustment of the conversion price upon the taking of specific actions by the issuer that would cause the value of the conversion right to be diluted], usually in combination with provisions [requiring advance notice to the debentureholders of such acts], plus a provision for equitable adjustment in the event of a merger or other reorganization [in which the issuer is the surviving company]. However,

---

[17]For example, the issuer may be prohibited from exceeding negotiated limits on the funded (long-term) debt it incurs. This preserves a margin of safety for the holders of debentures by "preventing a dilution of the debentureholders position and a weakening of the Company's financial structure through the creation of what is considered in the particular case to be an excessive amount of additional debt." *Commentaries* at 370.

> *adjustment of the conversion price by itself cannot provide the debentureholder with protection against all events which might substantially affect the conversion privilege.* For example, when the Company is to be *merged* into another corporation and the Company's common stock is to be replaced by convertible preferred stock or debentures of the surviving corporation, adjustment of the conversion price would not provide adequate protection. *Thus it is now customary to provide that the debentureholder will be given the right to convert his debentures into whatever securities are to replace the common stock of the Company.*

Commentaries at 528 (emphasis added).[18] Professor and former SEC Chairman Cary makes the same point:

> As a consequence of cases such as *Parkinson*, it has been found necessary in the conversion contract to provide for protection in the event of consolidations, mergers, conveyance of substantially all assets, capital reorganizations and reclassifications. If any of these occur the instrument frequently provides that the holder of the convertible security shall have the right thereafter to convert it "into the kind and amount of shares of stock and other securities and property receivable . . . by a holder of the number of shares of capital stock into which

[18]Although the quoted test refers only to providing a right to convert into the *securities* of the surviving company, the actual antidilution provision suggested in the *Commentaries* is of broader scope. See note 19, *infra*.

> such [convertible security] might have been converted immediately prior to such reclassification, change, consolidation, merger, sale, or conveyance."

W. Cary & M. Eisenberg, Cases and Materials on Corporations 1155 (5th ed. unabr. 1980) (elipsis and bracketed portion in original). The *Commentaries* contain a suggested antidilution provision with strikingly similar language to that set out in the above passage.[19]

---

[19]The sample provision in the *Commentaries* reads as follows:

> If any capital reorganization or reclassification of the capital stock of the Company, or consolidation or merger of the Company with another corporation, or the sale of all or substantially all of its assets to another corporation, shall be effected in such a way that holders of Common Stock shall be entitled to receive stock, securities or assets with respect to or in exchange for Common Stock, then, as a condition of such reorganization, reclassification, consolidation, merger or sale, the Company or such successor or purchasing corporation, as the case may be, shall execute with the Trustee a supplemental indenture providing that the Holder of each Debenture then Outstanding shall have the right thereafter and until the expiration of the period of convertibility to convert such Debenture into the kind and amount of stock, securities or assets receivable upon such reorganization, reclassification, consolidation, merger or sale by a holder of the number of shares of Common Stock into which such Debenture might have been converted immediately prior to such reorganization, reclassification, consolidation, merger or sale, subject to adjustments which shall be as nearly equivalent as may be practicable to the adjustments provided for in this Article Thirteen.

Commentaries at 549-50.

While the common law's treatment of conversion rights in the event of merger provides a useful background, and while various antidilution provisions promulgated by the American Bar Foundation and the commentators are useful for purposes of comparison, the resolution of this case ultimately turns upon our construction of the specific language in the Indenture under which the Debentures were issued in 1967.

C. The Applicable Rules of Construction

Though the parties are residents of many different states, and though the events with which we are concerned are national in scope, there is no dispute over which forum's law governs in construing the contract. Section 17.12 of the Indenture provides in pertinent part as follows:

> This Indenture and each and every provision hereof and of the Debentures shall be deemed to be a contract made under the laws of the State of New York, and for all purposes shall be construed in accordance with the laws of said State.

Thus, we will apply settled principles of New York law in construing the Indenture—although those principles of contract construction are very nearly universal throughout the United States.

[2, 3] The process of contract interpretation is the means through which the scope of the parties' agreement and their respective rights thereunder are determined. Under New York law, a written contract is to be interpreted so as to give effect to the intention of

the parties as expressed in the unequivocal language they have employed. *Breed v. Insurance Co. of North America*, 46 N.Y.2d 351, 355, 385 N.E.2d 1280, 1282, 413 N.Y.S.2d 352, 355 (1978). Due consideration must be given to the purpose of the parties in making the contract, and a fair and reasonable interpretation consistent with that purpose must guide the courts in enforcing the agreement. *Cromwell Towers Redevelopment Co. v. City of Yonkers*, 41 N.Y.2d 1, 6, 359 N.E.2d 333, 337, 390 N.Y.S.2d 822, 826 (1976); *Pittsburg Coke & Chemical Co. v. Bollo*, 421 F.Supp. 908, 928 (E.D.N.Y. 1976) (applying New York law), *aff'd*, 560 F.2d 1089 (2d Cir. 1977).

[4] The interpretation of an unambiguous contract provision is a function for the court rather than for a jury, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument. *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 56, 396 N.E.2d 1029, 1032, 421 N.Y.S.2d 556, 559 (1979); *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, 25 N.Y.2d 535, 540, 255 N.E.2d 709, 711-12, 307 N.Y.S.2d 449, 452 (1969); *Mendel-Mesick-Cohen-Architects v. Peerless Insurance Co.*, 74 A.D.2d 712, 713, 426 N.Y.S.2d 124, 126 (3d Dep't 1980).

[5-7] A court may not rewrite a term of a contract by "interpretation" when that term is clear and unambiguous on its face. *Fiore v. Fiore*, 46 N.Y.2d 971, 973, 389 N.E.2d 138, 139, 415 N.Y.S.2d 826, 826 (1979); *Rodolitz v. Neptune Paper Products, Inc.* 22 N.Y.2d 383, 386-87, 239 N.E.2d 628, 630, 292 N.Y.S.2d 878, 881 (1968). In interpreting the contract, a court must be concerned with what the parties intended, but only to the extent

that they evidenced what they intended by what they wrote. *Rodolitz*, 22 N.Y.2d at 386-87, 239 N.E.2d at 631, 292 N.Y.S.2d at 881. Neither may a court rewrite a contract to accord with its instinct for the dispensation of equity under the facts of a case. *DeVanzo v. Newark Insurance Co.*, 44 A.D.2d 39, 43, 353 N.Y. S.2d 29, 32 (2d Dep't 1974), *aff'd* 37 N.Y.2d 733, 337 N.E.2d 131, 374 N.Y.S.2d 619 (1975).

[8-11] Finally, under New York law, the entire contract must be considered, and, as between possible interpretations of an allegedly ambiguous term, that will be chosen which best accords with the sense of the remainder of the contract, and that interpretation is favored which will make every part of the contract effective. *Laba v. Carey*, 29 N.Y.2d 302, 308, 277 N.E.2d 641, 644, 327 N.Y.S.2d 613, 618 (1971); *National Equipment Rental, Ltd. v. Reagin*, 338 F.2d 759, 762-63 (2d Cir. 1964) (applying New York law). *Cf. Tandy Corp. v. United States*, 626 F.2d 1186, 1190 (5th Cir. 1980) (to correctly interpret a debenture indenture, court must consider the whole document). All parts of the agreement are to be reconciled, if possible, in order to avoid an inconsistency. *National Conversion Corp. v. Cedar Building Corp.*, 23 N.Y.2d 621, 625, 246 N.E.2d 351, 354, 298 N.Y.S.2d 499, 502 (1969). A specific provision will not be set aside in favor of a catch-all clause. *William Higgins & Sons, Inc. v. State*, 20 N.Y.2d 425, 428, 231 N.E.2d 285, 286, 284 N.Y.S.2d 697, 699 (1967). And the normal rule of construction that any fair doubt as to the meaning of the words chosen by the drafting party should be resolved against that party is inapplicable when there are not

two possible and reasonable interpretations.[20] *National Equipment Rental, Ltd.*, 388 F.2d at 763. Because courts are to adjudicate the rights of the parties according to

---

[20]Broad has argued in the district court and on appeal that any ambiguities in the Indenture should be construed against Rockwell, since its predecessor company, Collins, drafted the Indenture. Given our holding *infra* in parts II-*D* and II-*E* of this opinion that the Indenture is unambiguous, we need not reach this issue.

We note, however, that the record in this case does not necessarily support Broad's logic. An equally plausible argument could be made that any ambiguities in the Indenture should be construed against Broad rather than against Rockwell, for the *underwriters' counsel* drafted the provisions at issue in this litigation. See part IV-*A* of this opinion, *infra*. Broad, as a purchaser from an underwriter (at least indirectly), succeeded to the contractual rights and stands in the shoes of the underwriter who originally purchased those Debentures.

That such arguments, pro and con, can be made at all is itself instructive. While as a matter of abstract contract law it is proper to construe ambiguities against the drafter of a contract, that tenet of contract law has only limited practical significance in the context of construing an indenture. To the extend the rule is practicable at all, it can only be readily applied to those terms that were actually discussed and thought about by the parties—which is almost never the case with boilerplate provisions such as the ones at issue here. On these facts, it is difficult to fathom how even the most diligent, attentive, and intelligent jury could reach a rational conclusion as to the intent of the parties at the time the contract was executed, even were they instructed to construe any ambiguities in the Indenture (the written embodiment of the parties intent) against the drafter of that document. They would have little on which to base their decision other than the language of the Indenture itself.

Further, given that many other indentures contain language identical to that found in the Indenture at issue here, there is a

the unambiguous terms of the contract, they therefore must give the words and phrases employed in the contract their plain meaning. *Laba*, 29 N.Y.2d at 308, 277 N.E.2d at 644, 327 N.Y.S.2d at 618.

[12] As a matter of law, be it the law of New York or any other jurisdiction with which we are acquainted, the Indenture either is or is not ambiguous. It either does or does not adequately demonstrate the intent of the parties from its own four corners.[21] We cannot

---

(Footnote 20 Continued)

significant likelihood that other courts would feel bound by a finding by this court that as a matter of law this language is ambiguous. Thus, there is a significant likelihood as well that different juries, construing identical indentures in an attempt to divine "the intent of the parties," would reach different conclusions. This would indeed be anomalous, since the principal goal of using boilerplate language in such contracts is that there be uniform construction of those provisions.

In a different case, construing an indenture with different terms, we might be compelled to direct that a jury attempt such a difficult feat if we found the indenture to be ambiguous as a matter of law. In the case at bar, however, our holding *infra* that the Indenture is unambiguous spares any jury the obligation of undertaking that unenviable task.

[21]Broad has argued from time to time in this litigation that we should look to various documents other than the Indenture—*e.g.*, the face of the Debentures, the prospectus under which the Debentures were marketed, and various advertisements and press releases published by the defendants—as alternate sources of contractual rights. With regard to the Debentures and the prospectus, those documents specifically and repeatedly incorporate the Indenture by reference, and warn the investor that the contractual obligations and rights that attend the Debentures are governed solely by the

emphasize too strongly that the resolution of this issue is for the district court in the first instance, rather than for a jury; and because it is a question of law, we review the district court's decision with the full freedom to substitute our own judgment for that of the court below. The opinions of the many lawyers who have reviewed the Indenture before this litigation reached this court may be quite relevant for some other purposes—*e.g.*, for determining the defendants' good faith or the lack thereof. We may, but certainly need not, find the force of their legal reasoning compelling, and adopt it as our own. But on the initial and often determinative question of whether the contract sufficiently demonstrates the intent of the parties so as to be enforceable only by reference to the four corners of the document, it does not matter at all how many lawyers have in the past pronounced this contract to be ambiguous or unambiguous. Neither does it matter in whose behalf, or with what motives, or when, they made such arguments. We note that virtually every case involving the interpretation of a contract comes to us with two sets of lawyers and two sets of clients with sharply differing views of the meaning of the contract. But interpreting contracts is ultimately the business of the courts.

(Footnote 21 Continued)

Indenture. The suggestions that the press releases and advertisements constitute enforceable contract provisions in this situation is patently absurd. Those documents may be highly relevant, of course, to Broad's federal securities claims; but they are *not* a source of contractual rights.

D. The Meaning of Section 4.11 of the Indenture.

[13] The structure of the Indenture is fairly typical of convertible debenture indentures generally.[22] *See* American Bar Foundation, Model Debenture Indenture

---

[22]The negotiated "business" portions of the Indenture are largely interspersed through the first six articles. Article One contains defined terms. Article Two provides for the form of the Debentures and for certain ministerial processes connected with their issue, registration, and exchange. Article Three sets out the extent to which the debt represented by the Debentures is subordinated to senior indebtedness of Collins. Article Four sets out the conversion privileges. Article Five provides for the redemption of Debentures, and Article Six for the sinking fund mechanism used to redeem a portion of the issue each year. Article Seven contains formal covenants of the issuer (*e.g.*, to duly pay principal, premium, and interest on the Debentures, to maintain corporate offices and a corporate existence) as well as certain special provisions that were negotiated by the issuer and the lead underwriter (*e.g.*, restrictions on incurring funded debt and on paying especially large dividends).

The remainder of the Indenture is largely boilerplate. Article Eight provides certain bookkeeping details. Article Nine defines events of default and the remedies therefor. Article Ten provides for the duties of the Trustee, which are largely governed by the Trust Indenture Act of 1939, 15 U.S.C §§77aaa-77bbbb (1976). Article Eleven contains rules for determining the ownership of Debentures and for determining what constitutes collective action by the holders of Debentures. Article Twelve provides for meetings of the holders of Debentures. Article Thirteen authorizes the execution in certain circumstances of supplemental indentures. Article Fourteen comprises provisions intended to apply in the event of a consolidation, merger, or sale of assets of Collins. Article Fifteen contains the procedures for satisfaction and discharge of the Indenture. Article Sixteen limits the personal liability of certain of the company's controlling persons. Article Seventeen, the final article, contains miscellaneous provisions, including a

Provisions – All Registered Issues – 1967, *reprinted in Commentaries* at 19 & *passim* (1971). As might be expected, there is an article of the Indenture devoted wholly to the conversion rights of the holders of the Debentures, and a section within that article which addresses the possibility of a merger of Collins with another company: Article Four of the Indenture is entitled "Conversion of Debentures," and the next-to-last section of that Article, Section 4.11, is described in the Indenture's table of contents as governing the "[c]ontinuation of the conversion privilege in case of a consolidation, merger or sale of assets." We note that there is no provision in the Indenture which explicitly mandates that the holders of the Debentures should have a continuing right to convert into common stock *after a merger*. Aside from his few arguments based on the language of Section 4.11, Broad basically argues his case by implication from more general language that is not specifically addressed to the merger context. But because Section 4.11 is more specifically addressed to the merger context than any other provision of the Indenture, we begin our discussion with that particular provision, to see if the language thereof clearly and unambiguously conveys the intent of the parties.

(Footnote 22 Continued)

choice of law provision specifying that the Indenture shall be governed by the laws of New York State.

Many of the provisions of the Indenture that are pertinent to this lawsuit are set out in an appendix to the panel opinion, 614 F.2d at 441-47.

Section 4.11 provides, in pertinent part, as follows:

> In case of any consolidation of [Collins] with, or merger of [Collins] into, any other corporation . . ., the corporation formed by such consolidation or the corporation into which [Collins] shall have been merged . . . shall execute and deliver to the [Trust Company] a supplemental indenture . . . providing that the holder of each Debenture then outstanding shall have the right (until the expiration of the conversion right of such Debenture) to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such consolidation [or] merger . . . by a holder of the number of shares of Common Stock of [Collins] into which such Debenture might have been converted immediately prior to such consolidation [or] merger . . . .

Parsing this section into logical units, we note that it serves two purposes. First, it specifies what the Trust Company and Collins' successor must do in the event of a merger in which Collins is not the surviving company: they must execute a supplemental indenture that will formally provide for the conversion rights of the holders of Debentures after the merger. There is no question in this case but that Rockwell and the Trust Company complied with this directive, for they did execute a supplemental indenture detailing the post-merger conversion rights of the holders of Debentures. Rather, the question is whether the interpretation they have placed on the language of the Indenture and the supplemental indenture—that after the merger, the

holder of a Debenture would have the right to convert a Debenture in the principal amount of $1000 only into $344.75 in cash—fairly and adequately accords to the holders of Debentures their valid rights under the Indenture.

The second part of Section 4.11 provides by its terms that after the merger, the holder of each Debenture shall have the right to convert that Debenture into something—but what? It cannot be Collins Common Stock, for there will be no more of that after the merger. It therefore must be something else other than Collins Common Stock. The *nature* of the "something else" into which the holder of a Debenture can convert his Debenture is specified by reference to what the holders of the Collins Common Stock received in the merger: he can convert into the kind of "shares of stock and other securities and property" that the holders of Collins Common Stock received as part of the Merger Plan. Thus, if the holders of Collins Common Stock had received Rockwell Common Stock in the merger in exchange for giving up their shares of Collins Common Stock, the holders of Debentures would have been entitled, at any time after the merger for so long as their Debentures were outstanding, to convert into Rockwell Common Stock. Alternately, if the holders of Collins Common Stock had received Rockwell debentures in exchange for their Collins Common Stock, the holders of the Debentures would have been entitled to convert into Rockwell debentures.

Broad suggests that the use of the conjunctive "and" in Section 4.11 ("shares of stock *and* other securities *and* property") means that in every instance of a merger, the holders of the Debentures would be entitled to

receive all three types of property specified above. This might be a plausible construction, but for the fact that it would make meaningless the qualification to that phrase that follows immediately thereafter—"receivable upon such consolidation [or] merger . . . by a holder of . . . shares of Common Stock of [Collins]." We decline to read Section 4.11 as a mandatory directive that any plan of merger between Collins and another company had to include provisions for the receipt by the holders of Collins Common Stock of both stock on the one hand, *and* other securities and property on the other. Had the parties to the contract wished to fashion such a bizarre provision, they certainly would have done so in a more explicit fashion.

Thus, the plain meaning of Section 4.11 is that after a merger, the *nature* of that "something else" into which the holders of Debentures are entitled to convert in lieu of Collins Common Stock is exactly equivalent to the nature of the "something" that the holders of Collins Common Stock received in the merger. No substantive limit or mandatory specification is provided in Section 4.11 as to what the holders of Collins Common Stock may receive in the merger; but whatever types of compensation the shareholders may receive in exchange for their Collins Common Stock, the holders of the Debentures are entitled to convert into each and all of those types.

In the case at bar, it is undisputed that the holders of Collins Common Stock received *only cash* in exchange for their shares; under the terms of the Merger Plan, they did not receive stock or any other type of property. Thus, the nature of the "something else" into which the holders of Debentures are entitled to convert in

lieu of Collins Common Stock is *cash* – not Rockwell Common Stock, not other securities, and not other types of property besides cash.

But Section 4.11 also specifies the *quantity* of the "something else" into which the holders of the Debentures are entitled to convert after the merger. Like the nature of the "something else," the quantity of the "something else" is defined by reference to what the holders of the Collins Common Stock received in the merger. Under Section 4.11, each holder of Debentures is entitled to convert each of his Debentures into that amount of the "something else" which was receivable under the terms of the Merger Plan "by a holder of the number of shares of Common Stock of [Collins] into which such Debenture might have been converted immediately prior to such . . . merger."

Thus, Section 4.11 gives us a formula for computing the quantity of the "something else." There are two variables in the formula: the conversion price of the Debentures immediately prior to the merger, and the quantity of the "something" received by the holders of Collins Common Stock in exchange for each share they surrendered Common Stock, for there will be no more of that after the merger. It therefore must be something else other than Collins Common Stock. The *nature* of the "something else" into which the holder of a Debenture can convert his Debenture is specified by reference to what the holders of the Collins Common Stock received in the merger: he can convert into the kind of "shares of stock and other securities and property" that the holders of Collins Common Stock received as part of the Merger Plan. Thus, if the holders of Collins Common Stock had received Rockwell Common Stock in the

merger in exchange for giving up their shares of Collins Common Stock, the holders of Debentures would have been entitled, at any time after the merger for so long as their Debentures were outstanding, to convert into Rockwell Common Stock. Alternately, if the holders of Collins Common Stock had received Rockwell debentures in exchange for their Collins Common Stock, the holders of the Debentures would have been entitled to convert into Rockwell debentures.

Broad suggests that the use of the conjunctive "and" in Section 4.11 ("shares of stock *and* other securities *and* property") means that in every instance of a merger, the holders of the Debentures would be entitled to receive all three types of property specified above. This might be a plausible construction, but for the fact that it would make meaningless the qualification to that phrase that follows immediately thereafter—"receivable upon such consolidation [or] merger . . . by a holder of . . . shares of Common Stock of [Collins]." We decline to read Section 4.11 as a mandatory directive that any plan of merger between Collins and another company had to include provisions for the receipt by the holders of Collins Common Stock of both stock on the one hand, *and* other securities and property on the other. Had the parties to the contract wished to fashion such a bizarre provision, they certainly would have done so in a more explicit fashion.

Thus, the plain meaning of Section 4.11 is that after a merger, the *nature* of that "something else" into which the holders of Debentures are entitled to convert in lieu of Collins Common Stock is exactly equivalent to the nature of the "something" that the

holders of Collins Common Stock received in the merger. No substantive limit or mandatory specification is provided in Section 4.11 as to what the holders of Collins Common Stock may receive in the merger; but whatever types of compensation the shareholders may receive in exchange for their Collins Common Stock, the holders of the Debentures are entitled to convert into each and all of those types.

In the case at bar, it is undisputed that the holders of Collins Common Stock received *only cash* in exchange for their shares; under the terms of the Merger Plan, they did not receive stock or any other type of property. Thus, the nature of the "something else" into which the holders of Debentures are entitled to convert in lieu of Collins Common Stock is *cash*—not Rockwell Common Stock, not other securities, and not other types of property besides cash.

But Section 4.11 also specifies the *quantity* of the "something else" into which the holders of the Debentures are entitled to convert after the merger. Like the nature of the "something else," the quantity of the "something else" is defined by reference to what the holders of the Collins Common Stock received in the merger. Under Section 4.11, each holder of Debentures is entitled to convert each of his Debentures into that amount of the "something else" which was receivable under the terms of the Merger Plan "by a holder of the number of shares of Common Stock of [Collins] into which such Debenture might have been converted immediately prior to such . . . merger."

Thus, Section 4.11 gives us a formula for computing the quantity of the "something else." There are two

variables in the formula: the conversion price of the Debentures immediately prior to the merger, and the quantity of the "something" received by the holders of Collins Common Stock in exchange for each share they surrendered as part of the Merger Plan. Section 4.11 directs that we first determine the number of shares of Collins Common Stock that a holder of Debentures would have been entitled to receive had he converted his Debentures immediately prior to the merger. As of the date of the merger, nothing had happened to trigger any of the conversion price adjustment provisions set out elsewhere in Article Four of the Indenture. Therefore, the conversion price originally specified when the Debentures were issued—$72.50—was still in effect at the time of the merger. At this conversion price, the Debentures were convertible immediately prior to the merger at the rate of 13.79 shares of Collins Common Stock per $1000 in principal amount of the Debentures surrendered.

The formula next provides that we take the quantity of the "something" that was received by the holders of Collins Common Stock in the merger in exchange for each share of Common Stock they surrendered ($25 cash), and multiply that "something" by the number of shares of Collins' Common Stock into which the Debentures would have been convertible (13.79 shares per $1000 Debenture). The result is that each $1000 principal amount of Debenture is convertible into $344.75 cash (13.79 × $25).

Under the plain language of Section 4.11, then, we are compelled to the conclusion that Rockwell and the Trust Company correctly fulfilled their duties to execute a supplemental indenture providing for the post-merger

conversion rights of the holders of Debentures; further, they correctly calculated those rights as specified by the terms of Section 4.11. Unless there is some compelling reason that we should not give the language of this Section its plain meaning, Broad's breach of contract claim must fail.

E. Reconciling Section 4.11 with the Remainder of the Indenture

1. The *"Iowa law" argument*—Broad's first argument against giving the language of Section 4.11 its plain meaning is based indirectly on the "and other securities and property" clause. Broad concedes that under New York law, the term "property" includes cash within its scope. But, he argues, the parties could not have intended at the time of the Indenture's execution that the right to convert into cash could be substituted for the right to convert into Collins Common Stock. As support for this argument, he notes that Collins was incorporated under the laws of Iowa, and that as of 1967, when the Indenture was executed, Iowa law did not permit a merger in which the shareholders of the merged company received only cash in exchange for their shares. Rockwell and the Trust Company concede that such a merger was not possible under Iowa law until 1970.

The actual language of Section 4.11, however, is entirely inconsistent with Broad's argument. If the intent of the parties was that the right to convert into Collins Common Stock would be replaced in the event of a merger with a right to convert into only common stock of another company, then the phrase "and other securities and property" would be meaningless surplusage

with no effect. Under the New York rules of contract construction discussed above, contracts should be construed so as to give meaning to all provisions. The phrase "and other securities and property" can only have meaning if the contract is interpreted to mean that the parties intended that the holders of Debentures should be entitled to convert into *whatever* types of compensation the holders of Collins Common Stock could receive under the state law governing mergers at any given point in time.

We note as well that it would be entirely inconsistent with the tone and purpose of the remainder of the Indenture—which was drafted to provide, insofar as humanly possible, for every imaginable contingency—to impute to the parties an intent to freeze as of the year 1967 the nature of the property into which the Debentures were convertible. If that were in fact their intent, it would have ill served the holders of the Debentures. As our discussion above in part II-*B* of this opinion indicates, the conversion rights of the holders of Debentures are purely contractual in nature. Absent a contractual provision specifying that the conversion right would be replaced with the right to convert into something other than Collins Common Stock, post-merger holders of Debentures have no right to convert into *anything*. Thus, if the intent of the parties was that the right of the holders of the Debentures to convert into Collins Common Stock would be replaced with the right to convert into only whatever *common stock* the holders of Collins Common Stock received under the Merger Plan, the holders of Debentures would be entitled to convert into *nothing*, since the holders of Collins Common Stock received no common stock. The construction of

the Indenture that we instead adopt is by far more flexible and equitable to all concerned.

[14] 2. *Other arguments based on Article Four.* —Broad next argues that the Indenture elsewhere provides an absolute, unabridgeable right to convert into Collins Common Stock at any time while the Debentures are outstanding. He first points to Section 4.01, which provides in pertinent part as follows:

> *Subject to and upon compliance with the provisions of this Article Four,* at the option of the holder thereof, any Debenture . . . may, *at any time* [while the Debentures are outstanding] be converted . . . into fully paid and non-assessable shares . . . of Common Stock of [Collins] . . . .

(Emphasis added.) Broad would have us read the "at any time" language as precluding the effect we would otherwise give to the language of Section 4.11.

In the first place, if there were any conflict between the above-quoted language of Section 4.01 and Section 4.11, the latter would control under principles of New York contract law, since of the two sections, Section 4.11 is more specifically addressed to the merger context. But in fact there is no conflict. Broad's suggested construction would make sense only if we were to ignore the introductory phrase of Section 4.01—"[s]ubject to and upon compliance with the provisions of this Article Four." Section 4.11 is part of Article Four, and Section 4.01, by its very terms, is explicitly made subject to that article. Thus, the "at any time" language of

Section 4.01 is implicitly qualified by reference to Section 4.11 to mean "at any time—except in the merger context, at which point Section 4.11 becomes applicable."

Broad makes a similar argument based on the language of Section 4.07, which provides in pertinent part as follows:

> [Collins] shall *at all times* reserve and keep available, free from pre-emptive rights, out of its authorized but unissued Common Stock, for the purpose of effecting the conversion of the debentures, the full number of shares of Common Stock *then issuable upon the conversion of all outstanding Debentures.*

(Emphasis added.) Again, were there a conflict between this Section and Section 4.11, the latter would control because it is more specifically addressed to the merger context. Nonetheless, we find no conflict. Even though not prefaced by the "subject to . . . the provisions of this Article Four" language, Section 4.07 by its terms only applies in those circumstances when the conversion right, if exercised, would result in the issuance of Collins Common Stock. The obligation to maintain sufficient shares of Collins Common Stock can have no meaning when there is no longer a conversion right into that stock. There is no such right after a merger in which Collins is not the surviving company. Under this interpretation, Sections 4.11 and 4.07 mesh perfectly.

It is also noteworthy that Article Four contains lengthy and complex provisions which mandate the adjustment of the conversion price upon specified conditions that would otherwise dilute the value of the

conversion feature. *Nowhere* in Article Four, nor elsewhere within the four corners of the Indenture, is there *any* formula by which one could determine the ratio at which the Debentures would be converted into the surviving corporation's common stock. It would seem likely that such a formula would have been provided along with all the other conversion price adjustments, had the intent of the parties to the Indenture been that there should be an absolute right to convert into common stock of some sort, even in the event of a merger in which Collins and the Collins Common Stock would disappear.[23]

3. Arguments based on Article Fourteen.—Section 14.01 provides in pertinent part as follows:

> Nothing in this Indenture shall prevent any consolidation or merger of [Collins] with or into any other corporation or corporations (whether or not affiliated with [Collins]) . . . ; provided, however, and [Collins] hereby covenants and agrees, that upon any such . . . merger, . . . the due and punctual payment of the principal of (and premium, if any) and interest

---

[23]Such a formula could have been drafted with little difficulty, had the parties intended that there be an absolute right to convert into the surviving company's common stock. For example, the drafters could have provided that a post-merger holder of Debentures would have the right to convert into that number of shares of the surviving company's common stock which had an aggregate market value immediately prior to the merger that was equal to the aggregate market value of the number of shares of Collins Common Stock into which the holder of Debentures could have converted immediately prior to the merger.

> on all of the Debentures, according to their tenor, and the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture to be performed or observed by [Collins], shall be expressly assumed, by indenture supplemental hereto, satisfactory in form to the [Trust Company], executed and delivered to the [Trust Company] by the corporation formed by such consolidation, or by the corporation into which [Collins] shall have been merged . . . .

We begin by noting that the first phrase of this Section strongly supports the construction of the Indenture proffered by Rockwell and the Trust Company and accepted by the district court: if the Indenture provided an absolute right to convert into Collins Common Stock, there could be no completed merger of Collins into another company. The fact that Section 14.01 qualifies the entire Indenture evidences a strong and compelling intent of the parties that Collins should not be prevented from merging into another company by its obligations to the holders of the Debentures under the Indenture.

Broad's argument is based on the second clause of Section 14.01, which requires that the surviving corporation in a merger expressly assume "the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture." He argues that this requires the surviving company to observe the covenants made by the issuer in Sections 4.01 and 4.07—the "at all times" covenants discussed above in part II-*E-2* of this opinion. Unfortunately for Broad, however, we have determined that those sections

are not at all inconsistent with the interpretation we have placed on Section 4.11: in effect, Section 4.11 overrides those Sections. It is undisputed that Rockwell and the Trust Company did execute a supplemental indenture providing that Rockwell would observe all of those covenants applicable after the merger; likewise, it is undisputed that Rockwell has abided by those covenants, including the honoring of the debt obligation on the Debentures. Rockwell also stands ready to honor the conversion rights set out in the supplemental indenture, which have been adjusted pursuant to Section 4.11.

Section 14.02 provides in pertinent part as follows:

> In case of any such . . . merger, . . . and upon the execution by the successor corporation of an indenture supplemental hereto, as provided in Section 14.01, and upon compliance by such successor corporation with all applicable provisions of Section 4.11, such successor corporation shall succeed to and be substituted for [Collins] . . . .
>
> In case of any such . . . merger, . . . such changes in phraseology and form (but not in substance) may be made in the Debentures thereafter to be issued as may be appropriate.

(Emphasis added.) As stated above, Rockwell and the Trust Company did execute a proper supplemental indenture as provided for in Section 14.01, and they did comply with the applicable provisions of Section 4.11 in executing that supplemental indenture. Rockwell has

properly succeeded to Collins' rights and obligations under the Indenture. Broad's arguments under Sections 14.01 and 14.02 must fail.

[15] 4. *Arguments based on Article Thirteen.* —Article Thirteen of the Indenture governs the circumstances in which the issuer and the Trustee can execute a supplemental indenture. Section 13.01, which is described in the Indenture's table of contents as specifying the "[p]urposes for which supplemental indentures may be entered into without consent of the Debentureholders," provides in pertinent part as follows:

> [Collins], when authorized by a resolution of its Board of Directors, and the [Trust Company], subject to the conditions and restrictions in this Indenture contained, may from time to time and at any time enter into an indenture or indentures supplemental hereto . . . for one or more of the following purposes:
>
> (a) *to make provision with respect to the conversion rights of holders of the Debentures pursuant to the requirements of Section 4.11;*
>
> (b) to evidence the succession of another corporation to [Collins], or successive successions, and the assumption by the successor corporation of the covenants, agreements and obligations of [Collins] pursuant to Article Fourteen;
>
> (c) to add to the covenants and agreements of [Collins] in this Indenture contained

such further covenants and agreements thereafter to be observed, and ... to surrender any right or power herein reserved to or conferred upon [Collins];

(d) to cure any ambiguity or to correct or supplement any defective or inconsistent provision contained in this Indenture or in any supplemental indenture; and

(e) to make such provisions with respect to matters or questions arising under this Indenture as may be necessary or desirable and not inconsistent with this Indenture; *provided that such action shall not adversely affect the interests of the holders of any of the Debentures.*

The [Trust Company] is hereby authorized to join in the execution of any supplemental indenture authorized or permitted by the terms of this Indenture. ...

Any supplemental indenture authorized by the provisions of this Section 13.01 may be executed by [Collins] and the [Trust Company] without the consent of the holders of any of the Debentures at the time outstanding, notwithstanding any of the provisions of Section 13.02.

(Emphasis added.) We begin by noting that the first clause of this section reinforces our conclusions in part II-*D* of this opinion, *supra*, that Section 4.11 of the Indenture is intended to "make provision with respect

to the conversion rights of holders of the Debentures" in the event of merger. Secton 4.11, it will be recalled, requires in part that the surviving company in a merger execute a supplemental indenture in which is detailed the precise nature of the post-merger conversion rights of the holders of the Debentures, as calculated by the formula set out in Section 4.11.

Broad and the defendants have argued vigorously the question whether the last phrase in clause (e) of Section 13.01 modifies the entire section, or only clause (e). We agree with the defendants that under the most logical reading of Section 13.01, the phrase "provided that such action shall not adversely affect the interests of the holders of any of the Debentures" logically modifies only clause (e).[24] Next, as we have noted before, Section 4.11 is the most specific recitation of the rights of the holders of the Debentures in the event of a merger; clause (a) of Section 13.01 ties in directly, and with equal specificity, to Section 4.11. Were there a conflict between those two provisions and the catch-all last

---

[24]Clause (e) is as close to being an "openended" provision as anything in the Indenture; it would only make sense to limit the broad grant of the power to "make such provisions . . . as may be necessary or desirable" to those situations in which the interests of the holders of Debentures would not be adversely affected, lest the issuer's and Trustee's rights become so vague and unlimited as to render the entire contract unenforceable. The fact that this phrase is appended to the end of clause (e), rather than being set out after clauses (a) through (e) on a separate line beginning at the left margin, is also indicative of an intent that the phrase modify only clause (e). Further, elsewhere in the document, where the context clearly indicates that modifying phrases are intended to apply to several sequentially numbered clauses, those phrases *are* set out on separate line which begins at the left margin, or in introductory segments that precede all of the numbered clauses.

phrase of clause (e) of Section 13.01, the former provisions would govern.

But more fundamentally, the execution of a supplemental indenture that complies with the directives of Section 4.11 does *not* "adversely affect the interests of the holders of any of the Debentures." The holders of Debentures have a legitimate interest only in those rights that are accorded them under the Indenture. Section 4.11 specifies what those rights are in the event of a merger; therefore, the execution of a supplemental indenture that complies with the requirements of Section 4.11 cannot be adverse to the legitimate interests of the holders of Debentures.

Broad also argues from the language of Section 13.02, despite the specific statement in Section 13.01 that a supplemental indenture required by Section 4.11 and clause (a) of Section 13.01 may be executed notwithstanding anything in Section 13.02. This statement in Section 13.01 should, and does, foreclose any arguments under Section 13.02.

But even under Section 13.02, which is described in the Indenture's table of contents as providing for the "[m]odification of Indenture with consent of holders of 66⅔ in principal amount of Debentures," there is no help for Broad. Section 13.02 requires the permission of the holders of two-thirds of the Debentures before the issuer and the Trustee may execute a supplemental indenture that in any manner changes the rights and obligations of the parties to the Indenture or of the holders of the Debentures; certain types of alterations, including alterations of "the right to convert the [Debentures] into [Collins] Common Stock at the prices

and *upon the terms provided in this Indenture,*" are prohibited outright unless the Trustee and the issuer can obtain "the consent of the holder of each Debenture so affected." (Emphasis added.) Even were Section 13.02 applicable to those supplemental indentures that are required by Section 4.11 and clause (a) of Section 13.01, Section 13.02 would not prohibit that type of supplemental indenture, and neither would it require the consent of the holders of two-thirds or all of the Debentures: it is indisputable that one of the "terms provided in [the] Indenture" is Section 4.11 itself, and thus such a supplemental indenture does not *alter* the conversion rights of the holders of the Debentures. Rather, the supplemental indenture required under Section 4.11 merely evidences that all the requisite formalities for the clarification and protection of those rights have been complied with—*i.e.*, that the formula set out in Section 4.11 has become applicable, and that the surviving company of the merger has formally accepted all the other obligations of, and been fully substituted for, the original issuer.

F. Our Conclusions With Respect to the Indenture

We conclude, after examining the entire Idenure in addition to those portions discussed specifically above, that the district court was correct in its conclusion that the Indenture is unambiguous. The intent of the parties is clearly evident from the four corners of the document. Section 4.11 fully and unambiguously sets out the conversion rights of the holders of the Debentures in the event of a merger in which Collins is not the surviving corporation: the holder of any outstanding Debenture is entitled to convert his Debenture into only that which he would have received had he converted it into

Collins' Common Stock immediately prior to the merger. On the facts of this case, that means a converting holder of a Debenture is entitled to receive $344.75 in cash for each $1000 in principal amount of the Debenture. *Accord, Brucker v. Thyssen-Bornemisza Europe N.V.*, 424 F.Supp. 679, 688-90 (S.D.N.Y. 1976) (construing virtually identical indenture provisions against similar claims in similar context, and finding no abridgement of the rights of the holders of debentures because "the debenture holders have never had an absolute right [under the indenture] to convert into [the issuer's] stock in a merger"), *aff'd mem. sub nom. Brucker v. Indian Head, Inc.*, 559 F.2d 1202 (2d Cir.), *cert. denied*, 434 U.S. 897, 98 S.Ct. 277, 54 L.Ed.2d 183 (1977).[25] *Cf. Broenen v. Beaunit Corp.*, 440 F.2d 1244, 1248-49 (7th Cir. 1970) (under New York law, provision virtually identical to Section 4.11 of the Indenture mandated that holders of convertible debentures receive conversion right into that which holders of common stock received in a three-cornered merger, which was common stock of surviving company's parent company); *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 939 (Del.1979) (holder of convertible preferred stock after recapitalization is to receive "not what he would have received *before* recapitalization; that was the common stock ... Certainly [clause similar to Section 4.11 of the Indenture] is meaningless if the common share remains issuable *after* recapitalization" (emphasis in original)); *B.S.F. Corp. v. Philadelphia National Bank*, 204 A.2d 746, 750-51 (Del.1964) (construing

---

[25]The Second Circuit's decision in *Brucker* was an "[o]ral opinion delivered in open court in the belief that no jurisprudential purpose would be served by a written opinion. An oral opinion or a summary order is not citable as precedent. [Second Circuit] Local Rule §0.23." 559 F.2d at 1201 n.*.

virtually identical provisions in the context of a sale of "substantially all" of the issuer's assets).

[16] It is not the function of a court to rewrite a contract's terms in the process of "interpretation" to make them accord with the court's sense of equity. *DeVanzo v. Newark Insurance Co.*, 44 A.D.2d 39, 43, 353 N.Y.S.2d 29, 32 (2d Dep't 1974), *aff'd*, 37 N.Y.2d 733, 337 N.E.2d 131, 374 N.Y.S.2d 619 (1975). And yet, even were we inclined to do so, we are by no means certain that the outcome would be any different in this case.

Broad's persistent complaint has been that the Debentures' conversion feature was suddenly and arbitrarily liquidated, without permission or compensation. While the conversion feature has not technically been eliminated, since the holders of the Debenture retain the right to convert into $344.75 in cash for each $1000 principal amount of Debentures, it is true that the merger did eliminate the possibility that the holders of the Debentures would benefit as a result of the future profitability of the Collins business, just as the merger eliminated that possibility for the holders of the Collins Common Stock. A purchaser of Debentures, however, takes the risks inherent in the equity feature of the security, risks that are shared with the holders of the Collins Common Stock. One of those risks is that Collins might merge with another company—which is effectively the risk that any individual investor's assessment of the value of Collins Common Stock, based on Collins' prospects for the future, will be replaced by the collective judgment of the marketplace and the other investors in Collins who might vote in favor of the merger. This—like the risk that Collins' future operations might be lackluster, with the result that conversion might never

be economically attractive—is simply a risk inherent in this type of investment.

The terms of the merger necessarily reflected the business prospects of Collins as of 1973. The fact that the initial high hopes that the holders of Debentures had for the equity securities of Collins—hopes that were identical to those of the equity shareholders—were defeated by the economic setbacks Collins suffered between 1967 and 1973 is not alleged in this lawsuit to be anyone's fault, least of all Rockwell's or the Trust Company's. When the market set the price of Collins Common Stock at less than $20, that price reflected the current aggregate judgment of the marketplace as to Collins' prospects for the future. The tendering shareholders, and those who gave up their shares in the merger, actually received a premium of roughly $5 per share over the market price—a bonus of some 25%. The post-merger conversion terms mandated by Section 4.11 accorded the holders of the Debentures the benefit of that premium. They were accorded, as a result of the equity feature of the Debentures, the same treatment that the holders of the Collins Common Stock received, and they received value based, in part, on Collins' prospects for the future. Insofar as the debt feature of the Debentures is concerned, they benefited by the merger in that the Debentures are now backed by a financially more secure corporation.

Based upon our interpretation of the Indenture, and without hesitation given the nature of convertible debentures, we affirm the judgment of the district court with regard to Broad's breach of contract claims. We turn next to the other associated state-law claims

that were within the pendent jurisdiction of the district court.

III. ASSOCIATED STATE – LAW CLAIMS

A. *The Implied Covenant of Fair Dealing*

[17] As we understand New York law, every contract governed by the laws of that State necessarily contains an implied-by-law covenant to act fairly and in good faith in the course of performing the contract. *E. g., Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 68, 385 N.E.2d 566, 569, 412 N.Y.S.2d 827, 830 (1978); *Van Gemert v. Boeing Co.*, 520 F.2d 1373, 1383-85 (2d Cir.), *cert denied*, 423 U.S. 947, 96 S.Ct. 364, 46 L.Ed.2d 282 (1975), *appeal after remand*, 553 F.2d 812, 815 (2d Cir. 1977) (applying New York Law). The panel that first heard this case thought the Indenture to be ambiguous on the question of the conversion rights remaining with the holders of Debentures after a merger, and held that the evidence produced by Broad prior to the directed verdict raised a jury question as to whether Broad and the Trust Company had dealt fairly and in good faith with the holders of Debentures in the light of that ambiguity. 614 F.2d at 429-30. Having reached a different conclusion than the panel did on the ambiguity issue, we are compelled to a different result on the good faith and fair dealing issue as well.

[18, 19] We note first that this implied covenant of good faith and fair dealing cannot give the holders of Debentures any rights inconsistent with those explicitly set out in the Indenture. "[W]here the instrument contains an express covenant in regard to any subject, no covenants

are to be implied with respect to the same subject . . . ." *Burr v. Stenton*, 43 N.Y. 462, 464 (1871). "It is . . . well established in New York that, where the expressed intention of contracting parties is clear, a contrary intent will not be created by implication." *Neuman v. Pike*, 591 F.2d 191, 194 (2d Cir. 1979) (citing and applying New York law). The covenant is breached only when one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other. *Collard v. Incorporated Village of Flower Hill*, 75 A.D.2d 631, 632, 427 N.Y.S.2d 301, 302 (2d Dep't 1980). The mere exercise of one's contractual rights, without more, cannot constitute such a breach. *See Mutual Life Insurance Co. v. Tailored Woman, Inc.*, 309 N.Y. 248, 254, 128 N.E.2d 401, 403 (1955).

Broad relies here, as he did in the district court and before the panel, on the *Van Gemert* case cited above. The issue in that case was whether holders of Boeing debentures received adequate notice of the redemption of the debentures to allow them a meaningful opportunity to exercise the debentures' conversion feature. The *Van Gemert I* court held that although Boeing had formally complied with the notice provisions in the governing indenture, merely placing those provisions in the indenture was an inadequate means of apprising the holders of debentures of what notice would be given in the event of a redemption call. Absent more specific warning on the face of the debentures or elsewhere that the debentures could be called upon the minimal notice provided in the indenture, the court held that the "reasonable expectations" of the holders of debentures as to notice would be protected. 520 F.2d at 1383-85. The court stressed that "[t]he debenture holder relies on the opportunity to make a proper

conversion on due notice. Any loss occurring to him from failure to convert, as here, is not from a risk inherent in his investment but rather from unsatisfactory notice procedures." *Id.* at 1385. In explaining the basis for its holding in the earlier appeal, the *Van Gemert II* court described its earlier decision as "merely appl[ying] the settled principle, 'that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . .'" 553 F.2d at 815 (quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933); elipsis inserted by the Second Circuit).

We do not find the *Van Gemert* opinions of particular relevance to the case at bar.[28] The "loss," if any, suffered by the holders of Debentures was certainly not the result of unsatisfactory administrative procedures in the Indenture; rather, this case turns on the question of substantive rights that are basic to the nature of the contract. The risk of merger *was* inherent in the investment made by the holders of Debentures. Rockwell and the Trust Company did nothing that could be described as "destroying or injuring the right of the other party to receive the fruits of the contract," because under our holding in part II of this opinion, *supra*, the

---

[28]There is some indication that the *Van Gemert I* court was not entirely comfortable with its application of New York law. *See* 520 F.2d at 1382 n.19 (Oakes, J., indicating that he would have preferred to grant relief on the ground that the indenture's terms were implicitly modified by a listing agreement with the New York Stock Exchange). And we are by no means certain that the principles of New York law cited by the *Van Gemert II* court, although themselves indisputable, actually support the result the court reached.

benefits that the holders of Debentures received were all the rights to which they were contractually entitled. Indeed, had Rockwell conferred on the holders of Debentures rights significantly greater than those set out in the Indenture, it might have faced claims by its own shareholders for waste and corporate mismanagement. We believe this case to be governed by the other New York cases we have cited above. *See also Levine v. Chesapeake & Ohio Railroad Co.*, 60 A.D.2d 246, 248-50, 400 N.Y.S.2d 76, 78-79 (1st Dep't 1977) ("no actionable unfairness" in defendants' conduct, which eliminated public market for railroad's common stock, into which plaintiffs' bonds were convertible). As a matter of law, given our interpretation of the Indenture and the testimony concerning the conduct of the defendants (viewed in the light most favorable to Broad), we hold that the defendants did not violate the covenant of good faith and fair dealing that is implied into the Indenture under New York law. Accordingly, we affirm the judgment of the district court with respect to this claim.

B. *The Breach of Fiduciary Duty Claims*

In part IV-C-1 of its opinion, 614 F.2d at 430-31, the panel held that Rockwell owed the holders of Debentures a fiduciary duty of good faith and fair dealing because it controlled both parties to the 1973 merger. But the panel also held that if, on remand, the jury were to find that Rockwell had fully complied with its obligations under the Indenture, its fiduciary obligations also would have been discharged as a matter of law.

[20] We may assume, without deciding, that the panel was correct in its conclusion that Rockwell was

charged with a fiduciary duty to the holders of Debentures. But since we have determined in part II of this opinion that Rockwell fully complied with its obligations under the Indenture, there is no need for a jury to hear this claim, even if the panel's analysis is correct: for under that analysis, as applied in the light of our holding with respect to the Indenture, Rockwell can have no liability for breach of fiduciary duty. Accordingly, we affirm the judgment of the district court with respect to the breach of fiduciary duty claim against Rockwell.

In part IV-C-2 of its opinion, 614 F.2d at 431-32, the panel held that the Trust Indenture Act did not create any fiduciary obligations in addition to those imposed on the Trust Company under state law. For the reasons stated by the panel, we agree, and so hold. *Accord, Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1083 (2d Cir. 1977) (finding such a claim frivolous). There remains the question of the Trust Company's liability for breach of fiduciary duty under applicable state law.

The panel relied on *Dabney v. Chase National Bank*, 196 F.2d 668 (2d Cir. 1952), and *United States Trust Co. v. First National City Bank*, 57 A.D.2d 285, 394 N.Y.S.2d 653 (1st Dep't 1977), *aff'd mem.*, 45 N.Y.2d 869, 382 N.E.2d 1355, 410 N.Y.S.2d 580 (1978), for its conclusion that even in the absence of a default, an indenture trustee is cloaked under New York law with a fiduciary duty to the holders of debentures that may extend beyond its strict obligations under the indenture. Both *Dabney* and *City Bank* involved conflicts of interest in which the trustee put itself in a position of advantage over the beneficiaries of the trust. Arguably, the Trust Company faced a similar conflict of interest in the case

at bar when Rockwell threatened to bring a lawsuit, to withdraw other business it had with the Trust Company, and to force the Trust Company's resignation as Trustee if it refused to execute the supplemental indenture necessary for the merger.

Be that as it may, however, there is no actionable wrong in this case. We assume, without deciding, that the panel was correct in concluding that under New York law, the Trust Company's obligations "exceeded the narrow definitions of its duties in the indenture and encompassed fiduciary duties as well." 614 F.2d at 432. And had we agreed with the panel that the Indenture was ambiguous, there would be a real question whether the holders of Debentures had received in the supplemental indenture all that was contractually due them under the Indenture. Were that question answered in the negative, there would have been the further question whether the Trust Company had adequately discharged its duties to the holders of Debentures with the "absolute singleness of purpose" required by New York law. *Dabney*, 196 F.2d at 671. The evidence in the record regarding the advice given the Trust Company by its counsel prior to the execution of the supplemental indenture undoubtedly would have been relevant to the Trust Company's defensive claim that it had acted in good faith and on advice of counsel.

[21] But the question of whether the holders of Debentures received in the supplemental indenture all that was contractually due to them is conclusively answered by our holding in part II of this opinion, *supra*. Regardless of the Trust Company's motives, or its prior opinion as to the meaning of the Indenture, there is no question but that the Trust Company's

ultimate action – executing the supplemental indenture – fully protected what we have determined to be the legitimate rights of the holders of Debentures under the Indenture. Broad has cited no New York authority for the proposition that an indenture trustee has a duty, fiduciary or otherwise, to seek for the holders of debentures any benefits that are *greater* than those contractually due them; indeed, there is support in the New York cases for the opposite conclusion. *See Hazzard v. Chase National Bank*, 159 Misc. 57, 287 N.Y.S. 541 (Sup.Ct.1936), *aff'd mem.*, 257 A.D. 950, 14 N.Y.S.2d 147 (1st Dep't 1939), *aff'd mem.*, 282 N.Y. 652, 26 N.E.2d 801, *cert. denied*, 311 U.S. 708, 61 S.Ct. 319, 85 L.Ed. 460 (1940). We hold that the Trust Company had no duty, as a matter of law, to do anything other than that which it in fact did. Thus, there is no question for a jury as to whether there has been a breach of fiduciary duty. Accordingly, we affirm the judgment of the district court with respect to both the state and federal breach of fiduciary duty claims against the Trust Company.[27]

IV. THE FEDERAL SECURITIES CLAIMS

We reach at last Broad's federal securities claims, which provided the jurisdictional predicate for the pendent state-law claims we have heretofore discussed. Broad

---

[27]Given our holdings on the liability issues under each of Broad's state-law claims, we find it unnecessary to reach the district court's alternate ground for the directed verdict – *i.e.*, that no damages had been sustained as a matter of state law. We also find it unnecessary to reach Rockwell's argument that the panel erred in holding that the filing of a class action by Broad was adequate notice of default under the terms of the Indenture, 614 F.2d at 433.

alleges two separate claims under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1976), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5 (1980). We deal with those claims in turn, and though we reach the same ultimate conclusion as did the district court and the panel, we emphasize that we do so on far narrower grounds. We make no new law under Rule 10b-5 today, but merely apply well-settled principles to the facts of this case.

A. *The Failure to Disclose the Post-Merger Conversion Terms Set Out in the Indenture*

In his first federal claim, Broad essentially alleges that at the time the Debentures were issued in 1967, and thereafter up until the time of the merger in the fall of 1973, the defendants[25] omitted to disclose a material fact with regard to the contractual terms under which the Debentures operated—specifically, that under the terms of the Indenture, the right to convert into Collins Common Stock could, in the event of a merger, be replaced with the right to convert into only that which the holders of Collins Common Stock received in the

[25]Broad apparently seeks to hold Rockwell liable on this count under the theory that it is responsible as Collins' successor for Collins' alleged violations of Rule 10b-5 at the time the Debentures were issued. The involvement of the Trust Company in this count is less clear, since the Trust Company had no connection with the Debentures until it succeeded Chase as Trustee in May 1970. Presumably, Broad would impose on the Trust Company the duty to notice that the workings of Section 4.11 had not been detailed to the holders of Debentures in the prospectus or other sales materials, and to remedy that omission. We express no opinion on this theory.

merger.[29] Broad argues that this constituted a knowing, intentional, and reckless failure to disclose a material fact. The language of Section 4.11, of course, was available to anyone who cared to look at the Indenture, so Broad's claim can only be that the defendants should have made specific reference in the prospectus and other materials to that provision of the Indenture. His claim can alternately be read as a misrepresentation claim—*i.e.*, that various statements on the face of the Debentures,

---

[29]Rockwell has argued that the duty to disclose material facts imposed under the Securities Exchange Act of 1934 had been met as a matter of law in this case. While the face of the Debentures, the prospectus, and the advertisements and press releases issued in connection with the marketing of the Debentures did not specifically detail the operation of Section 4.11 of the Indenture, those communications by their nature must be relatively short and direct in comparison with the Indenture itself; it is both unwise and impractical, Rockwell argues, to require that these materials set out in detail the many provisions in the Indenture that might be called into play upon the happening of some future, uncertain contingency. The best that can realistically be expected of an issuer—and, according to Rockwell, the only legal obligation—is to indicate generally that the precise contractual rights attending the Debentures are specified in the Indenture, and to incorporate that document by reference into the prospectus and other marketing materials. Broad's counter-argument, of course, is that the terms upon which the Debentures may be converted are so material—so essential to the making of an informed investment decision—that the effect of even somewhat remote contingencies on the conversion terms should be explained in the prospectus and other materials.

This is certainly a difficult question of law and policy. Although we base our disposition of this claim on different grounds entirely, we do not wish to be read as implying an answer to that question by our failure to base our decision thereupon. Rather, we leave this question for some future case in which the answer thereto makes a difference in the outcome.

in the press releases and advertisements, and in the prospectus (all to the effect that the Debentures were convertible into Collins Common Stock at any time up until 1987) were misleading.

[22] It is a familiar proposition since the Supreme Court's decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), that as part of his case a plaintiff must allege and prove that the defendants acted with "scienter"—"a mental state embracing an intent to deceive, manipulate, or defraud." *Id.* at 193-94 n.12, 96 S.Ct. at 1381 n.12. The holding of that case was that mere negligence is insufficient to support liability in a private suit for damages under Rule 10b-5. The Court specifically left open, however, the question of whether recklessness could satisfy the scienter requirement. *Id. See also Aaron v. SEC*, 446 U.S. 680, 686 n.5, 100 S.Ct. 1945, 1950 n.5, 64 L.Ed.2d 611 (1980) (adopting definition of scienter as "a mental state embracing intent to deceive, manipulate, defraud" in the context of SEC enforcement proceedings, but leaving open the question of whether scienter may also include reckless behavior).

Several other circuits that have considered the question have held that recklessness could satisfy the scienter requirement. *E. g., Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023 (6th Cir. 1979); Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 44 (2d Cir.), *cert. denied*, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 698 (1978); *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1039-40 (7th Cir.), *cert. denied*, 434 U.S. 875, 98 S.Ct. 224, 54 L.Ed.2d 155 (1977). The recklessness

described by the Seventh Circuit in *Sanders* and *Sundstrand* is limited to

> a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Sundstrand, 553 F.2d at 1045. The Seventh Circuit characterized that sort of recklessness as "equivalent to willful fraud." *Id.*

[23] The panel opinion in this case agreed with our sister circuits that recklessness, properly defined and adequately distinguished from mere negligence, could satisfy the scienter requirement. The panel adopted the definition of recklessness that was articulated by the Seventh Circuit in *Sundstrand* and *Sanders*. 614 F.2d at 439-40. During the period that this case was pending before the en banc court, several other panels also addressed the topic of recklessness in varying

degrees.[30] In particular, while noting that the en banc court had not yet spoken on this question, a panel of this court explicitly held in *G. A. Thompson & Co. v. Partridge*, 636 F.2d 945, 961-62 & nn. 32-34 (5th Cir. 1981), that "severe recklessness" was sufficient to satisfy the scienter requirement. Accordingly, we hold that in the context of a private action for money damages brought under section 10(b) and Rule 10b-5, the requirement that the plaintiff prove scienter—*i. e.*, a mental state embracing intent to deceive, manipulate, or defraud—is satisfied by proof that the defendants acted with severe recklessness. Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.

---

[30] *Croy v. Campbell*, 624 F.2d 709, 715-16 (5th Cir. 1980), relied upon the panel's now-vacated adoption of the *Sundstrand* standard, but concluded, as did the panel in this case, that the record evidence could support no more than a finding of simple negligence. In *SEC v. Southwest Coal & Energy Co.*, 624 F.2d 1312, 1321 & n. 17 (5th Cir. 1980), Judge Reavley first pointed out that most courts which have considered the degree of recklessness necessary to satisfy the scienter requirement have set a very high standard, and accordingly held that the SEC had not demonstrated clear error in the district court's finding that recklessness had not been proved. *Dwoskin v. Rollins, Inc.*, 634 F.2d 285, 289-90 & n.1, 291 (5th Cir. 1981), noted that this circuit's position on this question was at that time unsettled, but affirmed a directed verdict on the ground that the evidence in that case did not present a jury question on scienter even assuming the *Sundstrand* standard applied.

[24] Applying this standard to the case at bar, we note that there is precious little testimony in the record concerning the events at the time the Debentures were issued. The creators of and original parties to the Indenture were Collins on the one hand, and a team of underwriters on the other. The underwriters were managed by Kidder, Peabody & Co. Incorporated and White, Weld & Co. Both sides were represented by counsel: Collins by Lynch, Dallas, Smith & Harman of Cedar Rapids, Iowa, and the underwriters by Sullivan & Cromwell of New York. C. J. Lynch of the Lynch, Dallas firm testified by deposition that the basic form of the Indenture was lifted from indentures that Collins and these underwriters had used in prior convertible debenture offerings by Collins; those indentures from the prior offerings had been drafted in the first instance by Kidder, Peabody's counsel, Sullivan & Cromwell.

The Indenture that emerged for the 1967 offering was only partially the result of actual negotiation between the parties. In the normal course of events, the issuer and the lead underwriter actively negotiate the business portions of an indenture, which deal with such provisions as the aggregate principal amount of the debentures, their maturity date, the interest rate they bear, the subordination of the debt they represent to any senior indebtedness, the rate at which they may be converted into common stock, the redemption prices and dates, and so forth. The remainder of the indenture is invariably made up of boilerplate provisions that typically are not discussed at all by either the representatives of the issuer or those of the lead underwriter; indeed, most of those provisions are not even discussed by counsel for the respective parties, and many of them are required by federal law to be inserted into the indenture verbatim.

Mr. Lynch's testimony in this case indicates that the drafting of the Indenture for the 1967 Collins Debenture issue was absolutely typical of industry practice: the boilerplate provisions, including those upon which this lawsuit turns, were never specifically discussed.

Such testimony as there is indicates that no party specifically considered at that time the possibility that Section 4.11 of the Indenture would be called into play at some future date, although Mr. Lynch testified that he had at some point "reviewed" the language of that section on Collins' behalf and found it satisfactory. There is no indication in the record that anyone acting for either Collins or the underwriters considered the inclusion in the prospectus and other sales materials of a detailed description of the operation of Section 4.11. Indeed, the testimony in the record overwhelmingly indicates that the parties thought themselves to be under no legal duty to disclose in detailed fashion in the prospectus and other sales materials any of the Indenture's provisions for more remote future contingencies. Neither is there evidence to raise a jury question on whether the defendants engaged in a continuing course of conduct to deceive subsequent purchasers after the Debentures were issued. Counsel for Broad even conceded, in arguing against the defendants' motions for a directed verdict in the trial court, that there was insufficient evidence to raise a jury question of scienter on this count.

Given all of this, we conclude that Broad's evidence on this count could support no more than a finding of simple negligence by the defendants in failing to disclose the workings of Section 4.11 in the prospectus and other sales materials. Accordingly, we affirm the judgment

of the district court with regard to this claim under Rule 10b-5.

B. *The Scheme to Deprive the Holders of Debentures of Their Right to Convert into Common Stock*

[25] In his second claim under Rule 10b-5, Broad alleges that the defendants collectively schemed to defraud the holders of Debentures of their right to convert the Debentures into common stock, substituting therefor a right to convert into cash. The panel opinion affirmed the district court's directed verdict on this claim on the ground that there had been no purchase or sale of the Debentures at the time of the merger because the supplemental indenture did not so substantially change the underlying security as to fall within the forced or constructive sale doctrine. 614 F.2d at 435-39.

[26] We agree that the directed verdict on this count was proper as a matter of law, but we base our decision on a different ground.[31] We have concluded in part II of this opinion, *supra*, that as a matter of law, the holders of Debentures received in the supplemental indenture all to which they were contractually entitled under the Indenture. There is no doubt but that there

[31]Our prior cases do not clearly answer the question of whether the execution of a supplemental indenture in this context satisfies the requirement of section 10(b) of the Securities Exchange Act of 1934 , see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975), that the complained-of fraud be in connection with a purchase or sale of a security. We specifically reserve this question for some future case in which a decision thereupon is necessary to the disposition of the case, and we express no opinion as to whether the panel's reasoning and conclusions were correct as an abstract matter.

was concerted, intentional conduct by the defendants to bring about that result. But as a matter of law, there was no violation of section 10(b) or Rule 10b-5 because there was no fraud. "Section 10(b) is aptly described as a catch-all provision, but what it catches must be fraud." *Chiarella v. United States*, 445 U.S. 222, 234-235, 100 S.Ct. 1108, 1118, 63 L.Ed.2d 348 (1980) (criminal prosecution under section 10(b) and Rule 10b-5). It is elementary that section 10(b) and Rule 10b-5 reach only conduct involving manipulation or deception. *E. g., Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 54, 50 L.Ed.2d 74 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). The defendants' conduct involved neither; they merely carried out their contractual obligations. As a conceptual matter, they could not have fraudulently schemed to deprive the holders of Debentures of a right that those holders did not in fact have. Accordingly, we affirm the judgment of the district court with regard to this claim under Rule 10b-5.[32]

V. CONCLUSION

The district court correctly interpreted the Indenture to provide unambiguously that upon a merger between Collins and another corporation in which Collins was not the surviving company, the sole conversion right of the holders of Debentures was to convert into the kind and amount of property (be it stock, other securities,

---

[32]Given our holdings on the liability issues in Broad's two claims under Rule 10b-5, we need not reach the district court's alternate ground for the directed verdict – that the holders of Debentures had sustained no actual damages.

cash, or other property) that would have been received by a holder of Debentures had he exercised his conversion right immediately prior to the merger. Because there was no question but that the defendants have properly recognized this right, the district court correctly directed a verdict for the defendants on the state-law breach of contract, breach of implied covenant of fair dealing, and breach of fiduciary duty claims. The district court also properly directed a verdict on the first federal securities claim—that the defendants omitted to disclose the workings of Section 4.11 at the time the Debentures were marketed—because Broad's evidence failed to raise a jury question on scienter. Finally, the court properly directed a verdict on the second federal securities claim—that the defendants had schemed to defraud the holders of Debentures of their right to convert into common stock—because as a matter of law, given the correct interpretation of the Indenture, there was no fraudulent conduct and hence no violation of section 10(b) and Rule 10b-5. Accordingly, the judgment of the district court is

AFFIRMED.

HENDERSON, Circuit Judge, concurring in part and dissenting in part:

Despite the majority's thorough and exhaustive review of the law of contracts, I adhere to the conclusion reached by the panel—the indenture is ambiguous. It does not clearly contemplate the plaintiffs' conversion

rights in the event of a cash-out merger.[1] I would therefore remand the case for a trial to determine the intent of

[1]My conclusion is based on what I perceive to be "holes" in the contract not my "instinct for the disposition of equity," *ante* at 947. Nonetheless, I cannot agree with the majority's assessment of the fairness of the outcome of this case, *ante* at 956-957.

Convertible debentures are a wholly different investment vehicle from common stocks, and are, contrary to the assertion of the majority, presumably purchased by persons with different views of the future. The current price of any security reflects the market's collective judgment of its prospects, with all possibilities discounted for their probability. Conversion rights will be exercised only if profitable, so the probability that the underlying stock will exceed the conversion price is a determinant of the value of a convertible security. But if the stock price stays down, the debentureholder's primary concern will be his interest income. The owners of stock, on the other hand, carry the entire burden of any decline in the value of their shares. All equityholders hope for a bright tomorrow, but the convertible debentureholder, who is also a corporate creditor, pays for protection against a gloomy future.

Debentureholders accept low interest precisely because they want upside participation without downside risk. The effect of the court's decision is to retain the low interest rate payable to the plaintiffs while denying them a right to participate in increases in the value of Collins' business. And the value of the conversion right has not only been frozen, it has been rendered practically worthless.

The purchase and sale of a convertible debenture, like that of any other security, is at heart an allocation of risks. Presumably the parties to the indenture considered the likelihood that the market interest rate and the market price of Collins shares would fluctuate during the life of the debentures. They supposedly had different expectations. But this case would not be here if all that was involved was the effect of the market. The question we face is whether the contract ordained that the right to convert into

the parties.[2] In all other respects I agree with the majority decision.

Much of the court's extended opinion relates to matters not in dispute. The part that focuses on the questions we confront does not, in my judgment, rebut the panel's conclusion. The panel opinion should, and does, stand on its own, and I see no need for extensive reiteration.

The plaintiffs maintain that upon merger Rockwell was required by §14.01 of the indenture to "expressly assume[ ]" all of Collins' obligations, including the §4.01 duty to exchange the debentures for stock. The majority finds this construction precluded by §4.11. I see no necessary conflict between §4.11 and §4.01.[3] A jury could read the indenture to provide that after a merger a debentureholder had conversion rights under at least

---

(Footnote 1 Continued)
equity could be eliminated. Perhaps the parties did consider the possibility and factored that into the price of the debentures. If they did, so be it. I, like the court, do not suggest that we alter anyone's contract. Were it relevant, however, I would dispute the majority's statement that this merger treated shareholders and debentureholders identically.

[2]The court affirms summary judgment on the fair dealing, fiduciary duty and second 10b-5 claims because all contractual obligations were satisfied. This logic is sound, but the holdings stand or fall with their stated premise – that the contract rights of the plaintiffs were respected.

[3]The majority opinion does not say that §4.11 is the exclusive operative section in mergers, but only that it controls in event of conflict.

two sections: a §4.11 right to convert into what the Collins shareholders received, *and* a §4.01 right to convert into the "Common Stock of the Company," "the Company" being Rockwell, §14.02. In stock-for-stock mergers these options would be similar, if not the same. Here however they are distinct. The plaintiffs simply insist that the §4.11 right is not exclusive. This is a fair interpretation of the contract, and the jury might adopt it.[4]

A brief comment on "the 'Iowa law' argument," *ante* at 951-952. Iowa did not permit cash-out mergers when the debentures were issued, and the plaintiffs suggest that the buyers could have safely assumed that after any merger they would still be entitled to convert into an equity interest in some going business. *CF. ante* at 941 (convertible security is a debt-equity hybrid). To be sure, specific provisions of the indenture enabled Collins to force the debentureholders to accept cash at any time, but only through liquidation, in which event the debtholders would have been entitled to receive full compensation prior to any distribution to equityholders, or through redemption, for about three times what the court now holds the debentureholders are due.

The majority notes that in reading the indenture, "Due consideration must be given to the purpose of the parties in making the contract, and fair and reasonable

---

[4]The court is troubled by the indentures' failure to provide a formula for the conversion of Collins debentures into Rockwell stock. This might be enough to convince a jury that the defendants have correctly construed the contract. On the other hand, it may be an inadvertent omission to be rectified with a §13.01(e) supplemental indenture. *Cf. ante* note 23.

interpretation consistent with that purpose must guide the courts in enforcing the agreement." *Ante* at 946.[5] The equity kicker, the whole point of a convertible security, was arguably the price insisted upon by buyers willing to accept a substantially reduced rate of interest. See 614 F.2d at 428. It seems unlikely that the debenture buyers, or for that matter the seller, thought this participation would be as short-lived as it turns out to have been. In any case I am not convinced by the court's treament of the matter. See 614 F.2d at 429. In fact, to quote the majority opinion, "Had the parties to the contract wished to fashion such a bizarre provision, they certainly would have done so in a more explicit fashion." *Ante* at 950; see also at 953.

---

[5] "We are of the opinion that this question [i.e., interpreting an indenture] is not necessarily to be answered by references to the general law concerning the sale of assets of a corporation. The question before us is the narrow one of what particular language of a contract means and is to be answered in terms of what the parties were intending to guard against or to insure."

B.S.F. Co. v. Philadelphia Nat'l Bank, 204 A.2d 746, 750 (Del.1964). See note 1, *supra*.

The few analogous cases, *ante* at 955-956, may support this view.[6] In *Broenen v. Beaunit Corp.*, 440 F.2d 1244 (7th Cir. 1970), which was purportedly followed by the district court in *Brucker v. Thyssen-Bornemisza Europe N. V.*, 424 F.Supp. 679, 688-90 (S.D.N.Y.1976), *aff'd mem. sub nom Brucker v. Indian Head, Inc.*, 559 F.2d 1202 (2d Cir.), *cert. denied*, 434 U.S. 897, 98 S.Ct. 277, 54 L.Ed.2d 183 (1977), the challenged merger was legal at the time the parties entered into the indenture, and therefore the court was able to invoke the "ancient principle of contract law that parties are presumed to have contracted with knowledge of and consistent with the law in effect at the time of execution of a contract." 440 F.2d at 1249 (citing *Mandell v. Cole*, 244 N.Y. 221, 155 N.E. 106 (1926)). This rule of contract construction, perhaps the only one not mentioned in the court's opinion, cuts the other way here. While it may not require a judgment for the plaintiffs, it properly focuses attention on the novel facts of this case, and explains why the §4.11 boilerplate, *ante* at 962 did not anticipate the substantial change in Iowa law.

---

[6]The panel properly distinguished *B.S.F. Co v. Philadelphia Nat'l Bank*, 204 A.2d 746 (Del. 1964) as involving a sale of assets and not a merger. The Supreme Court of Delaware emphasized this distinction, 204 A.2d at 749, and also pointed out that the holders of the debentures were still entitled to convert into *B.S.F.* common stock, 204 A.2d at 751. Similarly, the court upheld the distribution challenged in *Wood v. Coastal States Gas Corp.*, 401 A.2d 932 (Del.1979), because the indenture specifically provided for distribution of securities to holders of common stock (as opposed to an exchange) without adjusting the conversion ratio of preferred stock. 401 A.2d at 940. Again, the plaintiffs could still convert their preferred into common stock. 401 A.2d at 939-40.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CLAXTON MANUFACTURING
COMPANY, INC.,
Respondent.

No. 79-1527.

United States Court of Appeals,
Fifth Circuit.

May 14, 1980.

Application for Enforcement of an Order of the National Labor Relations Board (Georgia Case).

Elliott Moore, Deputy Associate Gen. Counsel, John G. Elligers, Lafe E. Solomon, Attys., John S. Irving, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, Michael F. Messitte, N.L.R.B., Washington, D.C., for petitioner.

Mitchell, Clarke, Pate & Anderson, James W. Wimberly, Jr., James P. Cobb, Atlanta, Ga., for respondent.

Curtis L. Mack, Director, Region 10, Atlanta, Ga., for other interested party.

Before GODBOLD, GEE and RUBIN, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petitioner's motion to clarify this Court's opinion filed on March 21, 1980, 613 F.2d 1364 (5 Cir.) is GRANTED. The following is added to our opinion in this case:

The case is REMANDED to the Board for an evidentiary hearing.

2

David BROAD et al.,
Plaintiffs-Appellants,

v.

ROCKWELL INTERNATIONAL CORPORATION et al.,*
Defendants-Appellees.

No. 77-2963.

United States Court of Appeals,
Fifth Circuit.

June 9, 1980.

Appeal from the United States District Court for the Northern District of Texas; Robert M. Hill, Judge.

Rod Phelan, John Andrew Martin, Dallas, Tex., Hugo L. Black, Jr., Thomas H. Seymour, Kenny, Nachwalter & Seymour, Miami, Fla., for plaintiffs-appellants.

Ernest E. Figari, Jr., David P. Seikel, Dallas, Tex., for Rockwell International Corp., Collins Radio Co., Anderson, Bateman, Booth, Willard F. Rockwell, Jr., Roodhouse, Beall, Cattoi, Fulgham, Martin, Erickson, Drick and Raff.

William F. Carroll, William B. West, III, Dallas, Tex., John F. Egan, New York City, for U.S. Trust Co. of New York.

Donald I. Strauber, Terry Thompson, Edwin Scott, New York City, for Rockwell International Corp.

James K. Manning, Brown, Wood, Ivey, Mitchell & Petty, New York City, amicus curiae for Brown, Wood, Ivey, Mitchell & Petty.

William J. Fitzpatrick, Atty., New York City, amicus curiae for Securities Industry Assoc.

Stanley T. Kalecyzc, National Chamber Litigation Center, Inc., Washington, D.C., amicus curiae for Chamber of Commerce of U.S.A.

Leonard Joseph, Dewey, Ballentine, Bushby, Palmer & Wood, New York City, amicus curiae for Donaldson, Lufkin & Jenrett, Inc., et al.

William H. Smith, American Bankers Assoc., Washington, D.C., amicus curiae for American Bankers Assoc.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC

(Opinion March 24, 1980, 5 Cir., 1980
614 F.2d 418).

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, and THOMAS A. CLARK, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Anthony SMITH,
Plaintiff-Appellant,

v.

ABC RENTAL SYSTEMS OF NEW ORLEANS, INC.,
Defendant-Appellee.

No. 78-3180.

United States Court of Appeals.
Fifth Circuit.

June 5, 1980.

Appeal from the United States District Court for the Eastern District of Louisiana; Edward J. Boyle, Sr., Judge.

Robert Hugh Matthews, Patrick D. Breeden, New Orleans, La., for plaintiff-appellant.

McGlinchey, Stafford, Mintz & Hoffman, David S. Willenzik, Leopold Z. Sher, B. Franklin Martin, III, New Orleans, La., for defendant-appellee.

Before MORGAN, CHARLES CLARK and TATE, Circuit Judges.

PER CURIAM:

The district court correctly held that the transaction which formed the basis of plaintiff-appellant's claim in

this action was not covered by the Consumer Leasing Act of 1976 (15 U.S.C. §1667) and section 226.15 of Regulation Z (12 C.F.R. §226.15), or the Truth-in-Lending Act (15 U.S.C. §1601 et seq.) and section 226.8 of Regulation Z (12 C.F.R. §226.8).

The judgment appealed from is AFFIRMED.

**Editor's Note:* The opinion of the United States Court of Appeals, Fifth Circuit in *Soliz v. Plunkett*, published in the advance sheets at this citation (618 F.2d 396), was withdrawn from bound volume publication.

David BROAD et al.,
Plaintiffs-Appellants,

v.

ROCKWELL INTERNATIONAL CORPORATION et al.,
Defendants-Appellees.

No. 77-2963.

United States Court of Appeals,
Fifth Circuit.

March 24, 1980

Debentureholders brought suit against company which issued the debentures, its successor corporation, the control persons of both and the trustee under indenture agreement, seeking either restoration of an option to convert the debentures into common stock,

judgment for the redemption price or acceleration of the obligation to pay the $1,000 face amount of each debenture. Plaintiffs alleged violations of the Securities Exchange Act and Rule 10b-5, and also asserted state law claims, including claims for breach of contract, breach of fiduciary duty, and breach of an implied covenant to deal fairly with debentureholders. The United States District Court for the Northern District of Texas, Robert M. Hill, J., granted defendants' motion for a directed verdict at the close of plaintiffs' case. Plaintiffs appealed, and the Court of Appeals, Coleman, Chief Judge, held that: (1) the indenture agreement was ambiguous with respect to whether the right of debentureholders to convert into common stock survived the merger; (2) the debentureholders were entitled to a jury determination of their state law claims for breach of contract and, if a breach of contract was found, the debentureholders would be entitled to a jury determination as to the claims for breach of fiduciary duties; (3) the supplemental indenture did not so substantially change the underlying security as to amount to a purchase and sale within the meaning of federal securities laws; and (4) the count charging that defendants engaged in a continuing course of conduct to omit disclosure of certain material facts to purchasers of the convertible subordinated debentures was properly dismissed for failure to produce evidence of scienter.

Affirmed in part, reversed in part and remanded.

1. Federal Civil Procedure—2127, 2609

On motions for directed verdict and for judgment notwithstanding the verdict, court could consider all evidence, not just that evidence which supported the

nonmover's case, but in the light and with all reasonable inferences most favorable to the party opposed to the motion.

2. Federal Civil Procedure—2146

A mere scintilla of evidence is insufficient to present a jury question; rather, there must be a conflict in substantial evidence.

3. Federal Civil Procedure—2126, 2608

Motions for directed verdict and judgment notwithstanding the verdict should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative fact to support a jury verdict.

4. Federal Courts—17

In suit to redress alleged violations of the Securities Exchange Act and Rule 10b-5, district court had pendent jurisdiction to hear state law claims that defendants breached an indenture contract and an implied covenant to deal fairly with debentureholders and also breached fiduciary duties owed debentureholders. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

5. Corporations—473, 587

Indenture contract was ambiguous with respect to whether option of debentureholders to convert into common stock survived merger, thus entitling debentureholders to convert into common stock of

successor corporation, where the section of the agreement dealing with conversion rights in the event of a merger, which provided that debentureholders were to receive a right to convert into whatever form of property was receivable upon merger by holders of common stock, did not specify a limitation on the reach of provision protecting debentureholders against any supplemental indenture which would adversely affect their interests and where prospectus had affirmatively represented and debenture certificates confirmed that the right to convert to common stock would continue through 1986 representations and an attorney who assisted in preparing the prospectus testified that he understood that the right to convert into common stock could not be taken away by a cash merger.

6. Corporations—473, 587

Where, under terms of indenture contract, New York law was to govern the interpretation of the contract, New York law was dispositive of what constituted property in the event of a cash merger for purpose of section of indenture agreement which provided for debentureholders to convert into the kind and amount of shares of stock "and other securities and property" received by holders of common stock.

7. Corporations—473, 587

Despite fact that indenture agreement provided that New York law was to govern interpretation of the agreement, New York law was not dispositive of question whether the parties intended the right of debentureholders to convert into the kind and amount of "shares of stock and other securities and property"

received by holders of common stock to be the exclusive conversion right in the case of a cash merger.

8. Contracts—176(2)

Whether an ambiguity exists in a contract is for the court to determine.

9. Evidence—448

If a contract is ambiguous, parol evidence going to the intent of the parties is in order.

10. Evidence—448

Fact that indenture agreement employed boilerplate provisions did not preclude use of extrinsic evidence to determine the intent of the parties where the indenture agreement was ambiguous.

11. Corporations—473, 587

In suit based on allegations that predecessor and successor corporations and bank which was trustee under indenture agreement breached the indenture contract when they executed a supplemental indenture eliminating the option to convert into common stock, evidence adduced by plaintiffs was sufficient to present jury questions as to the nature of the conversion right created by the indenture contract, whether defendants' action breached that right and whether the right to convert into common stock survived the supplemental indenture.

12. Corporations—473, 587

In suit wherein holders of debentures on date of corporate merger alleged that successor corporation and trustee under indenture agreement breached implied covenant to deal fairly and in good faith with debentureholders, evidence of the debentureholders' understanding that conversion feature of debentures would last for the life of the security was sufficient to present a jury question whether defendants' execution of a supplemental indenture in which, upon merger, the right to convert into common stock became a right to convert into cash breached an implied covenant.

13. Contracts—189

Fiduciary duties do not arise from contract provisions and cannot be ascertained by reference to contract interpretation.

14. Corporations—473, 590(1)

Whatever obligations successor corporation and trustee under indenture agreement owed to persons who were debentureholders on date of merger flowed from federal and state bodies of corporate fiduciary law and not from the indenture agreement.

15. Corporations—590(1)

Duty of successor corporation to holders of debentures issued by predecessor corporation was to see that the debentureholders were treated fairly and that they received what they were entitled to under the indenture agreement.

16. Corporations—590(1)

Even if successor corporation breached indenture contract when it executed a supplemental indenture eliminating option to convert into common stock, such breach would not automatically constitute a breach of the successor corporation's fiduciary duty to see that debentureholders were treated fairly; if, for example, the successor corporation acted in good faith based on reasonable understanding of the contract, it would not have breached its fiduciary obligation.

17. Corporations—591

In action wherein holders of debentures issued by predecessor corporation alleged that successor corporation had breached its fiduciary obligations to the debentureholders by eliminating an option to convert into common stock, evidence presented a jury question whether the successor corporation acted in bad faith or unfairly with respect to the debenture agreement when it entered into a supplemental indenture eliminating the conversion option.

18. Securities Regulation—29

There was nothing in the Trust Indenture Act which imposed on a trustee under an indenture agreement fiduciary obligations in addition to the duties expressed in the indenture itself. Trust Indenture Act of 1939, §301 et seq., 15 U.S.C.A. §77aaa et seq.

19. States—73

The Trust Indenture Act does not preclude imposition of state fiduciary duties on indenture trustees. Trust Indenture Act of 1939, §323(b), 15 U.S.C.A. §77www(b).

20. Corporations—479

Under New York law, trustee under convertible debenture agreement had a fiduciary duty to debentureholders.

21. Corporations—479

In debentureholders' action against trustee under convertible debenture agreement, it was for the jury to determine whether the trustee violated its fiduciary duty to debentureholders when it executed supplemental indenture eliminating an option to convert into common stock.

22. Corporations—473

Where debentureholders' claims for damages were limited to those available under state law actions based on breach of contract and breach of fiduciary duty, it would be inappropriate to award equitable relief in the form of redemption of debentures or restoration of disputed common stock conversion privilege.

23. Securities Regulation—120

Persons who were purchasers of convertible subordinated debentures could maintain Rule 10b-5 claim against company which issued the debentures and its

successor based on allegation that defendants engaged in a continuing course of conduct to omit disclosure of certain material facts to the purchasers of the debentures. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

24. Securities Regulation—64

In determining what may be considered a purchase or a sale within the scope of the securities fraud laws, the court must look to the meaning of the words used in the relevant section of the Securities Exchange Act. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

25. Securities Regulation—64

A "purchase" or "sale" within the meaning of the Securities Exchange Act is not necessarily a technical "purchase" or "sale" in the common-law sense. Securities Exchange Act of 1934, §3(a)(13, 14) as amended 15 U.S.C.A. §78c(a)(13, 14).

26. Securities Regulation—64

Even assuming that original debenture agreement called for a right to convert debentures into common stock, supplemental indenture which eliminated the option to convert to common stock did not so substantially change the underlying security as to produce a "purchase and sale" for purposes of federal securities fraud laws where, under the supplemental indenture, successor corporation affirmed its assumption of its predecessor's obligations to make punctual payment of principal and interest on the debentures according to terms contained

in the original issues and where the successor corporation had not redeemed the securities, ownership or control of the debenture had never changed hands and the transaction involving the supplemental indenture most resembled a contractual modification of a continuing agreement. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

See publication Words and Phrases for other judicial constructions and definitions.

27. Securities Regulation—117

Securityholders do not automatically have a cause of action under the antifraud section of the Securities Exchange Act to challenge action which affects the value of a security. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

28. Securities Regulation—117

Fact that plaintiff might be able to prove a claim for breach of contract or breach of fiduciary duty based on defendants' conduct in seeking to modify original indenture contract did not mean that plaintiff could bring a securities fraud action. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

29. Securities Regulation—117

For purposes of securities fraud liability, recklessness must not be so liberally construed as to obliterate any discernible distinction between scienter and negligence; "reckless conduct" describes an extreme departure from the standards of ordinary care which presents a danger

of misleading buyers or sellers that is neither known to defendant or so obvious that defendant must have been aware of it. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

See publication Words and Phrases for other judicial constructions and definitions.

30. Securities Regulation—118

To sustain a cause of action for securities fraud, based on claim that defendants engaged in a continuing course of conduct to omit disclosure of certain material facts to purchasers of convertible subordinated debentures, plaintiff debentureholders were required to show that defendants intentionally or recklessly failed to disclose the material information. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

31. Securities Regulation—139

Count charging that corporation which issued debentures, its successor corporation and trustee under indenture agreement engaged in a continuing course of conduct to omit disclosure of certain material facts to the purchasers of certain convertible subordinated debentures was subject to dismissal for lack of scienter where evidence produced by plaintiff was not sufficient to support a finding that defendants acted with the

requisite intent or with recklessness. Securities Exchange Act of 1934, §10(b) as amended 15 U.S.C.A. §78j(b).

John Andrew Martin, Dallas, Tex., Hugo L. Black, Jr., Thomas H. Seymour of Kenny, Nachwalter & Seymour, P.A., Miami, Fla., for plaintiffs-appellants.

Ernest E. Figari, Jr., David P. Seikel, Dallas, Tex., for Rockwell Intern. Corp., Collins Radio Co., Anderson, Bateman, Booth, Willard F. Rockwell, Jr., Roodhouse, Beall, Cattoi, Fulgham, Martin, Erickson, Drick and Raff.

William F. Carroll, William B. West, III, Dallas, Tex., John F. Egan, New York City, for U.S. Trust Co. of New York.

Donald L. Strauber, Terry Thompson, Edwin Scott, New York City, for Rockwell Intern. Corp.

Appeal from the United States District Court for the Northern District of Texas.

Before COLEMAN, Chief Judge, KRAVITCH, and HENDERSON, Circuit Judges.

COLEMAN, Chief Judge.

I

Facts

In January 1967 Collins Radio Company (Collins) was a prosperous enterprise, engaged in the development and production of radio communication and aircraft navigation equipment. It offered and sold to the public $40,000,000 in 4⅞% Convertible Subordinated Debentures, due January 1, 1987. Chase Manhattan Bank, N.A., was the Trustee under the terms of the indenture agreement. By a supplemental indenture executed in May 1970 the United States Trust Company of New York (Trust Company) was substituted for Chase Manhattan.

Beginning in fiscal 1969 Collins suffered a series of economic reversals which resulted in declining sales and reduced income. In 1971 defendant Rockwell International purchased $35,000,000 of Collins' convertible preferred stock and obtained the right to elect a majority of the Collins Board of Directors. Rockwell soon exercised this right of control, electing Robert C. Wilson, also a Rockwell Director, as President and Chief Executive Officer of Collins.

In August 1973 Rockwell made a tender offer of $25.00 per share for all of the outstanding common stock of Collins and indicated its intent, if the offer succeeded, to merge Collins into Rockwell. By October 1, 1973, Rockwell had acquired approximately 75 percent of the outstanding common stock of Collins, which enabled it to effect a short-form merger upon the non-tendering minority shareholders of Collins. The Collins-Rockwell Agreement and Plan of Merger provided that each

holder of Collins stock (other than Rockwell) would receive a cash payment of $25 per share, producing a "cash merger."

The 1967 Collins 4⅞% Convertible Subordinated Debentures are at the heart of this lawsuit. The debentures entitled the holders to convert into Collins common stock at a prescribed ratio. Rockwell took, and stands by, the position that under the debenture indenture agreement and as a result of the merger Rockwell and Collins were required to execute a supplemental indenture which would entitle the debentureholders to convert into the same thing which the holders of Collins common stock received in the merger. In other words, the stockholders received cash, hence the debentureholders had the right to convert into cash, but *only cash*. To put it succinctly, the debentureholders could not convert to stock in the merged corporation even though the original debenture agreement of 1967 had language which could be construed as providing for it.

In connection with the planned merger, Rockwell had its regular counsel review all of the agreements relating to Collins' outstanding debt and sought advice of counsel as to Rockwell's obligation under those agreements.

Counsel advised Rockwell that a debentureholder "would have the right . . . to convert the Debenture into the amount of cash that would have been payable with respect to the number of shares of Collins Common Stock into which the Debenture could have been converted immediately prior to effectiveness of the proposed merger," *that no further conversion right was required.*

Rockwell received essentially the same advice from counsel for Collins.

The Trust Company, as trustee, engaged *outside counsel* to advise it in connection with the merger and any supplemental debenture. John Campbell and John Marden, partners in the outside law firm, reviewed the documents. They concluded (in September 1973) that at the time the 1967 debenture contract was executed the intent of the parties was that the right to convert into common stock *would survive a merger* and would remain as a right of conversion into securities of the surviving corporation as long as the debentures remained outstanding. Since Rockwell should assume upon the merger the same obligations to the Collins debentureholders as Collins had prior to the merger, Rockwell would be bound to agree to an amendment providing the debentures were convertible until 1987. According to Campbell & Marden's preliminary analysis, without the consent of each debentureholder Rockwell could not alter or impair the right to convert into common stock. Finally, these attorneys concluded that Rockwell's control of Collins imposed upon Rockwell and the directors of Collins a fiduciary obligation to the debentureholders. Campbell and Marden informed United States Trust of their initial opinion and also informed Rockwell's counsel of their general views. According to Campbell's deposition testimony, he subsequently changed his mind and accepted the analysis enunciated

by Rockwell's counsel.[1] A formal opinion, concurring in the opinion offered by Rockwell and Collins counsel, was delivered on November 14, 1973.

However, on September 18, 1973, Campbell had advised the Trust Company that it had four alternative courses of action if Rockwell refused to assume the equity conversion rights after the merger: (1) the Trust Company could decline to execute a supplemental indenture unless it provided for a right to convert into Rockwell shares; or (2) the Trust Company, as a policy decision, could take no position as to the rights of the Collins debentureholders, then obtain a special and total indemnification from Rockwell for staying out of the controversy; or (3) the Trust Company could resign as indenture trustee; or (4) the Trust Company could seek a declaratory judgment with respect to the conversion rights. Campbell recommended Alternative 2, the course that was ultimately followed.

On October 11, 1973, Rockwell notified the debentureholders of the proposed merger and informed them that Rockwell and the Trust Company intended to execute a Supplemental Indenture which would provide for the assumption by Rockwell of the

> due and punctual performance and observance by Rockwell of all the terms, covenants and

---

[1]Just when and why Campbell altered his opinion is not clear. Although Campbell testified that he had revised his preliminary views during the first week of October (prior to Rockwell's notification to debentureholders of the merger), other documents indicated that as late as January 1974 Campbell continued to see some validity in his earlier view.

conditions of the Indenture. The Supplemental Indenture does not alter or impair the rights accorded under the Indenture to holders of the Debentures and does not change the provisions of the Indenture.

The letter further informed the debentureholders that conversion provisions provided that the holders

would have the right . . . to convert into the amount of cash that would have been payable with respect to the number of shares of Collins Common Stock into which the Debenture could have been converted immediately prior to effectiveness of the proposed merger.

The letter then calculated that after the merger, a $1000 debenture would be convertible into $344.75 cash.

Another paragraph stated that the

Trustee has advised that it does not take a position with regard to this letter or the statements herein, and that it has consulted with its counsel who confirmed that as Trustee it should not take a position with regard hereto.

Rockwell's letter precipitated letters from anxious debentureholders, inquiring about the status of their conversion rights. Rockwell responded with a form letter stating that Rockwell and Collins were relying upon the opinions of their counsel, but *refused requests for copies of those opinions. The Trust Company likewise declined to furnish counsel's opinions to the debentureholders.*

On November 14, 1973, Rockwell consummated the cash merger which had been announced on October 11, 1973. Pursuant to the terms of the merger agreement, a supplemental indenture was executed by Rockwell and the Trust Company as of November 1. Rockwell was substituted for Collins, and the conversion provisions were amended to allow each debentureholder to convert into cash.

II

Procedural Background

Plaintiffs, representing a class consisting of all holders of the debentures on the date of the merger, challenged defendants' actions with respect to the conversion provisions. Plaintiff contends that by the terms of the indenture the right to convert into Collins common stock survived the merger and that the debentureholders should be able to convert into the common stock of Collins' successor, Rockwell. Defendants deny any right to convert into Rockwell common stock, asserting that the right to convert into cash provided by the Supplemental Indenture satisfies the conversion terms of the original indenture.

Plaintiff debentureholders sued Rockwell, Collins, the control persons of both, and the Trust Company, seeking on behalf of the class either (a) restoration of the option to convert into common stock, (b) a judgment for the redemption price, or (c) acceleration of the obligation to pay the $1000 face amount of each debenture. They alleged (1) violations of §10(b) of the Securities Exchange Act of 1934, as amended (15 U.S.C. §78j(b)), and rule 10b-5 promulgated thereunder (17 C.F.R.

§240.10b-5); (2) employment of deception, scheme or artifice to defraud; and (3) engaging in a practice or course of business which operates as a fraud. They contend that the defendants breached fiduciary duties owed to the plaintiffs and that defendants breached the debenture contract.

At the close of plaintiffs' case on the third day of trial, defendants moved for a directed verdict. The motion was granted as to all claims. In its conclusions of law, the District Court found that there was no violation of Section 10(b) or Rule 10b-5 in connection with either the issuance of the original debentures or the 1973 Supplemental Indenture. The Court concluded that the debenture agreement was not ambiguous and that, as a matter of law, the defendants' construction was correct. Consequently, the District Court found no elements of fraud, breach of fiduciary obligations, or breach of contract. The Court also concluded that plaintiffs had failed to show actual damages and determined that equitable relief would be inappropriate.

On appeal, plaintiffs urge seven grounds for reversal. On the federal claims it is asserted that the jury could reasonably have inferred that defendants violated Rule 10b-5 and that the debentureholders have suffered damages as a result of the 10b-5 violations. In the state law claims it is contended that the jury could have reasonably inferred (1) that Rockwell and the Trust Company breached the indenture contract when they executed a supplemental indenture eliminating the option to convert into common stock; (2) that Rockwell has breached an implied covenant to deal fairly and in good faith with the debentureholders; (3) that Rockwell and the Trust Company breached fiduciary obligations to

the Collins debentureholders in eliminating the option to convert into common stock even if Rockwell had scrupulously complied with the merger statute and the debenture contract; (4) that the option to convert into common stock survived the supplemental indenture; and (5) that Rockwell is required to redeem the debentures at the redemption price specified in the contract or at the maturity price.

We affirm those portions of the District Court decision which denied recovery under Section 10(b) and Rule 10b-5.

We remand the case for trial primarily on the issue of breach of contract, as hereinafter set forth.

III

The Standard for Review

[1-3] In considering the issues raised in this appeal we observe the standards for review of a directed verdict as articulated in *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict,

granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

IV

State Law Claims[2]

[4] Since we must reverse and remand on the state law claims, we consider them first.

Plaintiffs' central contention is that Rockwell, Collins, and the Trust Company breached the indenture contract when they executed a supplemental indenture eliminating

[2]The District Court has pendant jurisdiction to hear the state law claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

the option to convert into common stock. It is argued that the option to convert into common stock survived the supplemental indenture. Companion claims are that Rockwell breached an implied covenant to deal fairly with the debentureholders, and that under the contract Rockwell is required to redeem the debentures at the redemption price specified in the contract or at the maturity price. Plaintiffs further assert that both Rockwell and Trust Company breached fiduciary duties owed the debentureholders.

A. *Breach of Contract*

[5] It is insisted that the trial court erred when it held as a matter of law that the indenture contract was unambiguous and that Rockwell correctly construed the Indenture in 1973, fully respecting the rights of the Collins debentureholders when Rockwell and Collins merged.[3]

The relevant indenture provisions are §§4.01, 4.11, 13.01, 13.02, 14.01, and 14.02, set out in full in an appendix to this opinion and which may be summarized as follows:

> Article Four deals expressly with the conversion of the debentures. Section 4.01 establishes the conversion right and provides

[3] In Conclusion of Law No. 11 the District Court stated that "the Indenture provisions governing the debentureholders' conversion rights upon a merger are not ambiguous. Those rights can be ascertained from the four corners of the instrument." In Conclusion No. 14 the Court asserted that "[t]he Indenture mandated that the conversion rights upon a merger become a right to convert into that which the Collins shareholders received in the merger."

that prior either to January 1, 1987, or to redemption if the debentures are called for redemption prior to that date, any debenture may be converted at the principal amount into common stock of the company at an initial conversion price of $72.50 per share, with subsequent conversion prices to be determined in accordance with §4.04.

Section 4.11 provides in pertinent part:

> In case of . . . any merger of the Company into, any other corporation . . . the corporation into which the company shall have been merged . . . shall execute and deliver to the Trustee a supplemental indenture . . . providing that the holder of each Debenture then outstanding shall have the right (until the expiration of the conversion right of such debenture) to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such . . . merger by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such . . . merger.

Article Thirteen governs supplemental indentures. Section 13.01 authorizes the Trustee to enter into supplemental indentures for a limited set of purposes, one of which is "to make provision with respect to the conversion rights of holders of Debentures pursuant to the requirements of Section 4.11," *provided such action does not adversely affect the debentureholders.* The

section also states that any supplemental indenture entered for those limited purposes may be executed without the consent of the debentureholders, "notwithstanding any of the provisions of Section 13.02".

Section 13.02 provides that *without the consent of the debentureholders* no supplemental indenture shall extend the fixed maturity of the debenture, reduce the principal, reduce the rate or extend the payment of interest, reduce the premium, or "alter or impair the right to convert the same into Common Stock at the prices and upon the terms provided in this Indenture."

Article Fourteen outlines additional provisions governing any consolidation, merger, or sale of the company. Section 14.01 stipulates that in any consolidation, merger, or sale, the new corporation will expressly assume "the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture to be performed or observed by the Company."

Section 14.02 states that in case of any consolidation, merger, or sale, the successor corporation shall succeed to and be substituted for the Company upon the execution of a supplemental indenture according to §14.01 and upon compliance by the successor corporation with all applicable provisions of §4.11.

It is plaintiff's contention that these provisions, read together, secure to the debentureholders the right upon a merger of Collins to convert into common stock of the successor company. He notes that the section establishing the conversion right extends that right until either January 1, 1987, or the redemption of the

debenture and does not expressly limit that right upon a merger. Plaintiff reads §4.11 as creating rights for debentureholders in addition to the right of conversion. Thus, under this view, upon a merger, debentureholders have both the right to convert into common stock of the successor company and the right to convert into whatever property the Collins shareholders have. Plaintiff concedes that §13.01 allows the Trustee to enter into a supplemental indenture pursuant to a merger without the consent of the debentureholders, but contends that this authority is limited to those aspects that do not adversely affect the rights of the debentureholders. He relies upon §13.02's requirement of debentureholder consent before a supplemental indenture can alter or impair the conversion right as enhancing the view that any supplemental indenture removing the right to convert to common stock adversely affects the debentureholders' rights.

The defendants read §4.11 as the exclusive statement of the debentureholders' conversion rights upon a merger. They point out that §4.11 provides that the debentureholders are to receive a right to convert into whatever form of property the holders of common stock receive in the merger. The holders of Collins common stock received cash in the merger, not Rockwell common stock. Thus, defendants argue, the holders of Collins convertible debentures were to receive and did receive the right to convert into an equivalent amount of cash, not Rockwell common stock.

It is further asserted that the other provisions of the indenture are consistent with this view of §4.11. They point out that §14.01 expressly declares that nothing in the indenture shall prevent a merger of

Collins into another corporation and §14.02 provides that the successor corporation shall, in that event, enter into a supplemental indenture with the trustee, assuming its obligations under the Indenture and complying "with all applicable provisions of §4.11." They assert that §13.01 "plainly states that such a supplemental indenture 'may be executed by the Company and the Trustee without the consent of the holders of any of the Debentures . . .,' notwithstanding any of the provisions of §13.02."

Defendants cite *B.S.F. Co. v. Philadelphia National Bank*, 42 Del.Ch. 106, 204 A.2d 746 (Del. 1964) wherein the Trustee under an indenture securing an issue of debentures brought suit challenging a sale by B.S.F. of "substantially all" of its assets to Glen Alden Corp.

We find the decision in *B.S.F.* inapplicable to this situation. In *B.S.F.* the question of the conversion right involved a sale of assets, *not a merger.* B.S.F. continued to exist and conduct business after the transaction. Moreover, the right of the debentureholders to convert into common stock of B.S.F. was in no way affected by the transaction. Indeed, the court specifically noted that the debentureholders still possessed the option to convert into into B.S.F. stock.[4]

Defendants also cite *Brucker v. Thyssen-Bornemisza Europe N.V.*, 424 F.Supp. 679 (S.D.N.Y. 1976), *aff'd sub*

---

[4]The Court observed that "the right of conversion of the debentures into stock of B.S.F. is still preserved and the debenture holders can exercise their election to convert their debentures into B.S.F. stock in accordance with the terms of the debentures." 204 A.2d at 751.

nom. Brucker v. Indian Head, Inc., 559 F.2d 1202 (2d Cir.), *cert. denied sub nom. Rome v. Indian Head, Inc.*, 434 U.S. 897, 98 S.Ct. 277, 54 L.Ed. 2d 183 (1977). There, several holders of convertible debentures objected to a Rule 23 settlement proposal which allowed debentureholders, as part of a merger, to convert for cash but did not grant them the right to convert into common stock. Asserting that the court can in no way alter the debentureholders' contract rights under the indenture, they argued that the indenture prevented a forced conversion into money in the event of a merger. The objectors contended that §12.02,[5] which provided for approval by two-thirds of the outstanding debentures when the issuer wished to change the indenture itself and which required consent of each debentureholder when the right to convert is altered or impaired, should be interpreted to require the written consent of each debentureholder, since an attempt was being made to alter or impair the conversion right. 424 F.Supp. at 689.

The parties to the settlement argued that the voting requirements of §12.02 did not apply in the case of a merger. Rather, they stated that §§5.06,[6] 13.01,[7] and 13.02[8] should govern the merger, since these sections specifically discuss what is to occur in case of a merger.

---

[5]Section 12.02 was in essence the same as §13.02 in the Collins indenture.

[6]The language in §5.06 parallels that of §4.11 in the Collins indenture.

[7]Section 13.01 corresponds to §14.01 of the Collins indenture.

[8]Section 13.02 corresponds to §14.02 of the Collins indenture.

The district court agreed, stating that §5.06 should control because it contained a detailed and specific provision as to what the debentureholders' rights are in a merger while §12.02 dealt with their rights in a general context. *Id.* The Court then read §5.06 to require only that debentureholders have the right to convert into whatever form of property the shareholders receive in the merger. Since the stockholders received only cash as a result of the merger, the debentureholders were entitled only to the right to convert into cash. The Second Circuit orally affirmed the District Court decision from the bench, on the basis of the opinion below.

However, under the local rules of the Second Circuit, an oral opinion carries no precedential value. The decision thus remains, for all intents and purposes, that of a district court.

We cannot agree with the view adopted in *Brucker*. We do not think that on its face the Collins debenture agreement speaks with the requisite clarity to the issue before us. To be sure, §4.11 does deal in the most detail with the conversion rights in the event of a merger, but §4.11 does not specify a limitation on the reach of the provisions of Article Thirteen, which protects the debentureholders against any supplemental indenture which would adversely affect the interests of the debentureholders.

We consider that a supplemental indenture which alters a conversion right has a potentially adverse effect on those interests. As the Second Circuit observed in *Van Gemert v. Boeing Co. (I)*, 520 F.2d 1373 (2d Cir.),

cert. denied, 423 U.S. 947, 96 S.Ct. 364, 46 L.Ed 2d 282 (1975).

> What one buys when purchasing a convertible debenture in addition to the debt obligation of the company incurred thereby is principally the expectation that the stock will increase sufficiently in value that the conversion right will make the debenture worth more than the debt. The debenture holder relies on the opportunity to make a proper conversion on due notice." *Id.* at 1385.

See also *Kusner v. First Pennsylvania Corp.*, 531 F.2d 1234, 1238 (3rd Cir. 1976) ("The possibility that the value of common stock will increase to a point where it exceeds the value of the bond is the sales feature with which the issuer obtained a lower-than-market interest rate on the bond.").

In *Chock Full O'Nuts Corp. v. United States*, 453 F.2d 300 (2d Cir. 1971), a challenge to the tax treatment of convertible debenture issues, the Second Circuit expressly recognized that part of the selling price of the debenture was attributable to the conversion feature. The Court pointed out that the debentures provided for two mutually exclusive modes of satisfying the obligation: "Under one the holder may exercise his right to convert the debenture into common stock, in which event he will surrender his debenture and it will not be redeemed or paid at maturity . . . . The alternative to conversion is that the [issuing corporation] will redeem the debenture or pay it at maturity, in which event the conversion privilege will be terminated . . . ." 453 F.2d at 304.

Consequently, the alteration of the conversion right affects a significant interest under the indenture. The indenture itself reflects the importance of this right when it prohibits an alteration or impairment of the conversion right without the consent of each affected debentureholder.

Finally, the prospectus *affirmatively represented* that the right to convert to common stock would continue until January 1, 1987. The debenture certificates, themselves, confirmed those representations.

[6, 7] J. C. Lynch, an attorney who assisted in the preparation of the prospectus for Collins, testified that he understood at the time the indenture was executed that the right to convert into common stock could not be taken away by a cash merger. It is not insignificant that at the time the debentures were issued the law of Iowa, the State in which Collins was incorporated, did not allow cash mergers, a fact which shaped the views of Mr. Lynch.[9]

[9]Defendants point out that by the terms of the indenture, New York law governs the interpretation of the contract. See §17.12. They stress that §4.11 provides for the debentureholders to convert into the kind and amount of "shares of stock and other securities and *property*" received by the holders of common stock (emphasis added). As we understand New York law, it considers money to be property. *People v. Wagner*, 120 Misc. 214, 217, 198 N.Y.S. 65, 68 (Sup.Ct. 1923), *aff'd*, 208 App. Div. 828, 203 N.Y.S. 946 (1924); *Fullerton v. Young*, 46 Misc. 292, 294, 94 N.Y.S. 511, 512 (Sup.Ct. 1905). While New York law is dispositive of what constitutes property in the event of a cash merger, it does not determine the issue of whether the parties intended this right to convert to be the exclusive conversion right in case of a cash merger. While Iowa law is not dispositive either, plaintiff may find it useful in helping establish the contemplation of the parties at the time the indenture was agreed upon.

For all of the foregoing we hold that the indenture contract was, and is, ambiguous.

We decline to hold that as matter of law §4.11 *overrides* the protection enunciated in Article 13. Viewed together, the sections leave plenty of room for a difference of opinion as to what the indenture contract mandates in the situation we have before us. Certainly, the suggestion that §4.11 is an anti-dilution provision designed to insure that during a merger the stockholders do not receive more than the debentureholders is as reasonable and plausible as the opposing view that §4.11 is the exclusive statement of what conversion rights the debentureholders will have in the event of a merger.

[8-10] It is axiomatic that the determination of whether an ambiguity exists is for court determination. If ambiguity is present then parole evidence going to the intent of the parties is in order.[10]

[11] The jury should have been allowed to ascertain the nature of the conversion right, whether the defendants' action breached that right, and whether the right to convert into common stock survived the Supplemental Indenture. The directed verdict should not have been granted because at that point the plaintiffs had adduced sufficient evidence to go to the jury on the actual meaning of the contractual provisions in issue.

---

[10]Defendants argue that the use of extrinsic evidence should be rejected because the indenture employed standard boilerplate provisions. We disagree. When the use of boilerplate provisions creates ambiguity, the need to know what the parties were trying to do by using those forms becomes even more important.

B. *Implied Covenant of Fair Dealing*

[12] As a second component of the breach of contract claim, plaintiff contends that Rockwell and the Trust Company breached an implied covenant to deal fairly and in good faith with the debentureholders. By the terms of the indenture, New York law governs the contractual claims.

In *Van Gemert v. Boeing Co. (I)*, 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947, 96 S.Ct. 364, 46 L.Ed.2d 282 (1975), the Court considered an allegation that debentureholders had not received adequate notice of the redemption of the bonds to allow the holders to exercise their conversion. The Court noted the particular importance of the conversion feature of the debentures and found that although notice provisions were contained in the 113-page debenture agreement, this was an inadequate means of apprising the debentureholders of what notice would be given of a redemption call. Because of the importance of the right of conversion, more than a technical compliance with the debenture terms was necessary if the debentureholders were to be treated fairly. In *Van Gemert v. Boeing Co. (II)*, 553 F.2d 812 (2d Cir. 1977), the court explained that in *Van Gemert I*

> we merely applied the settled principle, "that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . ." *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933). Simply stated, every

> contract contains the implied requirement of good faith and fair dealing. Boeing was found liable therefore because it breached its contract with appellants, and damages were awarded.
>
> 553 F.2d at 815.

Similar considerations must apply to this case, where once again the issue is compliance with a debenture contract of which the right to convert is an important element. The plaintiff has introduced evidence of the debentureholder's understanding that the conversion feature would last for the life of the security. He has produced testimony about Rockwell's and the Trust Company's actions in creating a supplemental indenture in which the right to convert into common stock became, upon the merger, a right to convert into cash. This evidence, hereinabove recited, is sufficient to send the issue to the jury. Defendant, of course, may produce testimony to demonstrate that, in the context of Collins' situation, the action was fair to the debentureholders. But the final resolution in such a case belongs to the jury.

C. *Breach of Fiduciary Duty*

In addition to the claims based on the contract, plaintiff asserts that Rockwell and the Trust Company violated fiduciary duties they owed to the debentureholders—Rockwell, because of its position as a stockholder in Collins; Trust Company by virtue of its position as trustee under the indenture.

[13, 14] Fiduciary claims impose obligations beyond those expressly stated in the contract. They are not

contractual provisions, and the extent of fiduciary duties cannot be ascertained by reference to contract interpretation. Thus whatever obligations defendants owed the debentureholders must flow from federal and state bodies of corporate fiduciary law.

1. *Rockwell*

Rockwell concedes that it owed the debentureholders a fiduciary duty of good faith and fair dealing. Although courts have more frequently addressed the obligations of controlling shareholders toward the corporation and the minority, *see, e. g., Zahn v. Transamerica Corp.*, 162 F.2d 36 (3rd Cir. 1947); *Bryan v. Brock & Blevins Co., Inc.*, 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844, 95 S.Ct. 77, 42 L.Ed.2d 72 (1974), a number of courts have stated that these fiduciary obligations extend to debentureholders and creditors as well. *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12, 92 S.Ct. 165, 169, 30 L.Ed.2d 128 (1971); *Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939); *Brown v. Presbyterian Ministers Fund*, 484 F.2d 998, 1005 (3rd Cir. 1973); *Bayliss v. Rood*, 424 F.2d 142 (4th Cir. 1970). In *Pepper v. Litton*, 308 U.S. at 311, 60 S.Ct. at 247, the Supreme Court indicated that a majority stockholder is bound by the "fiduciary standards of conduct which he owes the corporation, its stockholders *and creditors*" (emphasis added). Elaborating on this observation, the Court stated

> He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter

> how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*.
>
> 308 U.S. at 311, 60 S.Ct. at 247.

While courts have recognized these obligations, they have also rejected attempts to expand specific contractual rights to hold that a corporate defendant or a controlling shareholder had a "duty" to the plaintiff that extended beyond performance of the contract. *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F.2d 1040 (8th Cir. 1977), *cert. denied*, 435 U.S. 925, 98 S.Ct. 1490, 55 L.Ed.2d 519 (1978); *Fershtman v. Schectman*, 450 F.2d 1357 (2d Cir. 1971), *cert. denied*, 405 U.S. 1066, 92 S.Ct. 1500, 31 L.Ed.2d 796 (1972); *Ryan v. J. Walter Thompson Co.*, 453 F.2d 444 (2d Cir. 1971), *cert. denied*, 406 U.S. 907, 92 S.Ct. 1611, 31 L.Ed.2d 817 (1971). Where the defendant had fully complied with the contract, he had discharged his obligation.

[15] We think a similar view is appropriate in this case. If the jury finds that Rockwell fully complied with the terms of the debenture agreement, then the fiduciary duty claim should not be reached. Rockwell's duty to the debentureholders was to see that they were treated fairly and that they received what they were entitled to under the agreement. A finding that

the contract's terms were fully complied with is conclusive demonstration that Rockwell performed its duty.

[16, 17] On the other hand, a jury finding that Rockwell breached the contract does not automatically lead to a determination that Rockwell breached its fiduciary duty. In considering fiduciary duty claims, the courts have generally required a showing of bad faith, fraud, or unfair conduct. *See, e. g., Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939); *Wright v. Heizer Corp.*, 560 F.2d 236, 250 (7th Cir. 1977), *cert. denied*, 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (1978); *Polin v. Conductron Corp.*, 552 F.2d 797, 809 (8th Cir.), *cert. denied*, 434 U.S. 857, 98 S.Ct. 178, 54 L.Ed.2d 129 (1977); *Bryan v. Brock & Blevins Co., Inc.*, 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844, 95 S.Ct. 77, 42 L.Ed. 72 (1974); *Lebold v. Inland Steel Co.*, 125 F.2d 369 (7th Cir. 1941). If, for instance, Rockwell acted in good faith, based on a reasonable understanding of the contract, then it would not have violated its fiduciary obligation even though it breached the contract. If, however, Rockwell acted in bad faith or unfairly with respect to the debenture agreement, then it breached its duty to the debentureholders. Whether Rockwell's conduct was unfair or in bad faith is, of course, an issue for the jury.

2. *The Trust Company*

[18] The alleged fiduciary obligations of the Trust Company as trustee raise both federal law and state law issues. The duties of the Trust Company must be measured by the requirements of the Trust Indenture Act of 1939, 15 U.S.C. §§77aaa *et seq.*, by the Indenture, and by state-law mandates. The Trust Indenture Act

prescribes the contents of indenture agreements underlying corporate debentures of the sort involved here. There is no allegation that the indenture agreement failed to comply with the statutory requirements, but rather that the Act creates a fiduciary obligation in addition to the duties expressed in the indenture itself. We find nothing in the Act that imposes upon a Trustee any obligations beyond those contained in the indenture. Section 315(a) of the Act permits the trustee's responsibilities under the Act to be limited to the terms specifically set forth in the indenture."

In *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), the Second Circuit considered an allegation that the trustee under a convertible debenture agreement in connection with a sale of certain corporate assets was liable for its failure to negotiate a better conversion price for the debentureholders and to make its views known on the adequacy of the conversion price offered. The Court refused to find a fiduciary obligation imposed by the Indenture Act and thus concluded that the bank had no duty to negotiate for a fair conversion price or to make known its views regarding the fairness of the price offered. 560 F.2d at 1083. We think those observations are applicable in the situation before us. We thus refuse

---

"15 U.S.C. §§77*ooo*(a)(1) states that the indenture may provide that "the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such indenture."

to find a fiduciary obligation inherent in the Trust Indenture Act.[12]

[19] At the same time, however, we do not read the Act to preclude the imposition of state fiduciary duties on indenture trustees.[13] The Trust Indenture Act, §323, 15 U.S.C. §77www(b), provides in part that the "rights and remedies provided by this subchapter shall be in addition to all other rights and remedies that may exist . . . at law or in equity." We find nothing to indicate that the Act was an effort to limit the protection for debentureholders. *See also United States Trust Company of New York v. First National City Bank*, 57 A.D.2d 285, 394 N.Y.S.2d 653 (N.Y.Sup.Ct. 1977).

[20] We now examine New York law to see if it allows the imposition of fiduciary duties on indenture trustees. We find illumination in *Dabney v. Chase National Bank of City of New York*, 196 F.2d 668 (2d Cir. 1952). Considering an indenture executed before the Trust Indenture Act and governed by New York law, the Court stated that the trustee's obligations exceeded the narrow definitions of its duties in the indenture and encompassed fiduciary duties as well. The Court rejected an interpretation, advocated here by the Trust

[12]Article Ten of the indenture agreement sets out the Trustee's obligations under the indenture. The relevant portions are reproduced in the Appendix to this opinion.

[13]*Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), dealt solely with fiduciary obligations under federal law and did not expressly treat obligations under state law.

Company, of language in *Hazzard v. Chase National Bank*, 159 Misc. 57, 287 N.Y.S. 541 (Sup.Ct. 1936), *aff'd without opinion*, 257 App.Div. 950, 14 N.Y.S.2d 147 (1st Dept. 1939), *aff'd without opinion*, 282 N.Y. 652, 26 N.E.2d 801 (1940), *cert. denied*, 311 U.S. 708, 61 S.Ct. 319, 85 L.E.d 460 (1940), which appeared to restrict the trustee's duties to the terms of the agreement. Instead, the Court found a fiduciary duty imposed on the Indenture Trustee under New York law. According to the Court, "a trust for the benefit of a numerous and changing body of bondholders appears to us to be preeminently an occasion for a scruple even greater than ordinary; for such beneficiaries often have too small a stake to follow the fate of their investment and protect their rights." 196 F.2d at 671. New York lower court decisions indicate that the Second Circuit's analysis is still good law. *See United States Trust Company of New York v. First National City Bank*, 57 A.D.2d 285, 394 N.Y. S.2d 653 (N.Y.Sup.Ct. 1977) (citing *Dabney* with approval).[14]

[21] We thus hold that the Trust Company was cloaked with a fiduciary duty to the debentureholders. Whether the Trust Company violated that duty is for the jury.[15]

---

[14]The Trust Company contends that the language of *Dabney* must be limited to situations in which a default has occurred. We read *United States Trust Company of New York* to express a broader view of fiduciary duties.

[15]Trust Company in its brief outlines a series of facts which, it asserts, demonstrates that the Trust Company more than complied with its obligations under the debenture, evidencing a "punctilious regard by the Trust Company for the rights of the Debentureholders." Those facts would be relevant to a jury's determination of whether the Trust Company breached its fiduciary duty, but they do not, as a matter of law, allow the Trust Company to go forth unscathed.

D. *Damages*

[22] As an alternative ground for granting its directed verdict motion, the District Court concluded that the plaintiff had failed to demonstrate any actual monetary damages and that the equitable relief the plaintiff sought, *i.e.*, redemption of the debentures or restoration of the common stock conversion privilege, was inappropriate. The Court also held that the plaintiff had failed to show that the contractual conditions precedent to any acceleration of the debt had occurred.

Plaintiff's damage claims are limited to those which are available under his state law actions, *i.e.*, breach of contract and breach of fiduciary duty, and we agree with the trial court that equitable relief is inappropriate in these circumstances, as traditional legal remedies are sufficient.

If the jury agrees with plaintiff's interpretation of the indenture agreement and finds that Collins and Rockwell breached that agreement, then the District Court may find the defendants in default under the terms of the debenture and require them to comply with the default provisions. The default provisions do not constitute equitable remedies; a breach of the agreement is a contractual condition of the default provisions. Failure to adhere to the default agreement renders the company liable for money damages, *i.e.*, the difference between the default payment and the fair market value of the bond.

Article Nine of the indenture outlines the remedies of the debentureholders in the event of default. According to the provisions of that article, upon default the holders

of not less than 25 percent of the principal amount of the debentures may declare the principal and accrued interest due and payable immediately, in effect accelerating the maturity of the debt. Enumerating the events which constitute default, §9.01 includes

> (d) failure on the part of the Company duly to observe or perform any other of the convenants or agreements on the part of the Company in the Debentures or in this Indenture contained, continued for a period of 90 days after the date on which written notice of such failure, requiring the same to be remedied, shall have been given to the Company by the Trustee, or to the Company and the Trustee by the holders of at least 25% in aggregate principal amount of the Debentures at the time outstanding. . . . .

A finding that the defendants breached the indenture would constitute a failure to perform the agreements in the indenture. The initial suit by the plaintiff, who represents in excess of 95 percent of the debentureholders at the time of the breach, constitutes adequate notice of such failure and sufficient demand that the failure be remedied. The court may thus find that the formal requirements of §9.01(d) have been complied with.

The availability of adequate legal remedies, through the default provisions or monetary damages, is sufficient reason to avoid the significant interference with ongoing corporate operations which equitable relief, either through forced redemption or restoration of the conversion privilege, could possibly create.

E. *Summary of Our Holding as to the State Law Claims*

We find that terms of the 1967 Collins indenture to be ambiguous.

The plaintiff is entitled to a jury determination of his claims which charge breach of contract and, if a contractual breach is found, those which allege breach of fiduciary duty.

If the verdict is for the plaintiff, the Court may grant relief through acceleration of the maturity date or appropriate monetary damages.

V

The 10b-5 Claims

We have already stated that in our opinion the plaintiff failed to make out a claim for 10b-5 relief. We now state our reasons for this result.

Plaintiff contends that the defendants violated section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.

§78j(b),[16] and Rule 10b-5, 17 C.F.R. §240.10b-5,[17] issued by the Securities and Exchange Commission pursuant thereto. The violations allegedly occurred in two separate contexts. Count I charges that the defendants engaged

---

[16]Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. §78j, provides in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

---

[17]Employment of manipulative and deceptive devices.

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

in a continuing course of conduct from 1967 until 1973 to omit the disclosure of certain material facts to the purchasers of the Collins 4⅞% Convertible Subordinated Debentures. Plaintiff argues that the defendants failed to inform debenture purchasers that in the event Collins merged into, consolidated with, or was acquired by, another corporation, the successor corporation could substitute a right to convert into cash for the right to convert into common stock. According to plaintiff, this constituted a knowing, intentional, and reckless failure to disclose a material fact.

Count II focuses upon defendants' conduct in connection with the 1973 Supplemental Indenture. Plaintiffs assert that the defendants schemed to defraud the debentureholders of their right to convert the debentures into common stock and to substitute therefor a right to convert the debentures into cash.

The District Court denied both claims. In Count I the Court noted that *scienter* is an essential element of the asserted claim and held that the record contained no evidence which would support a finding that the defendants intended to deceive the purchasers of the debentures. In rejecting Count II, the Court offered three independent grounds: (1) The record disclosed no evidence that the defendants acted with *scienter*. (2) Defendants correctly construed the Indenture in 1973, and the rights of the debentureholders were fully respected when Collins and Rockwell merged. (3) The alleged wrongs did not occur in connection with a purchase or sale of a security. In addition, the District Court held that the record was devoid of evidence from which reasonable men could find "actual damage" with respect to either 10b-5 claim.

Our analysis of the 10b-5 claims takes place against an extensive background of recent Supreme Court and appellate court decisions interpreting §10(b) and Rule 10b-5. Although §10(b) does not by its terms create an express civil remedy for its violation, the existence of a private cause of action for violations of the statute and the Rule is now well established.[18]

A. *Purchase or Sale*

We turn first a consideration of whether the alleged unlawful conduct of defendants occurred in connection with a purchase or sale of securities. The courts have required that the plaintiffs be actual purchasers or sellers to maintain an action under 10b-5, with the classic expression of this doctrine appearing in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952). Although the requirement has received judicial and academic criticism,[19] the Supreme Court forcefully

---

[18] *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477-80, 97 S.Ct. 1292, 1303-1304, 51 L.Ed.2d 480 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196, 96 S.Ct. 1375, 1382, 47 L.Ed.2d 668 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730, 95 S.Ct. 1917, 1922-1923, 44 L.Ed.2d 539 (1975); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 150-54, 92 S.Ct. 1456, 1470-1472, 31 L.Ed.2d 741 (1972); *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n. 9, 92 S.Ct. 165, 169 n. 9, 30 L.Ed.2d 128 (1971). *See also Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 93 (5th Cir. 1975); *Reed v. Riddle Airlines*, 266 F.2d 314 (5th Cir. 1959).

[19] *See, e.g.*, the discussion in *Rekant v. Desser*, 425 F.2d 872 (5th Cir. 1970).

reaffirmed the *Birnbaum* doctrine in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). We have likewise required that challenged conduct occur in connection with a purchase or sale of securities.[29] *See, e.g., National Bank of Commerce of Dallas v. All American Assurance Co.*, 583 F.2d 1295, 1298 (5th Cir. 1978); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 93 (5th Cir. 1975); *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970).

[23] Count I alleges violations with respect to the purchases of the 4⅞% Convertible Subordinated Debentures originally issued in 1967. Here the plaintiffs are purchasers within the clearest sense of the word and may bring a 10b-5 claim.

The disposition of Count II, alleging fraud in connection with the 1973 Supplemental Indenture, is more difficult. Plaintiffs contend that in effect they exchanged a debenture with a common stock conversion right for a debenture without such a conversion right as a result of the Supplemental Indenture. Accordingly, they assert that this exchange complies with the requirements for the applicability of §10(b) and Rule 10b-5.

We have been unable to locate any appellate case which has directly addressed whether the execution of a supplemental indenture affecting the conversion rights of an indenture constitutes a purchase or sale under 10b-5.

---

[29] A debenture is expressly included in the definition of "security." 15 U.S.C. §78c(a)(10).

[24, 25] In determining what may be considered a purchase or a sale, we look to the meaning of the words within the context of section 10(b). *SEC v. National Securities, Inc.*, 393 U.S. 453, 466, 89 S.Ct. 564, 571-572, 21 L.Ed.2d 668 (1969). The Exchange Act defines a purchase to include "any contract to buy, purchase, or otherwise acquire" securities, 15 U.S.C. §78c(a)(13). The Securities Act defines a sale to include "any contract to sell or otherwise dispose of" securities, 15 U.S.C. §78c(a)(14). The Supreme Court admonishes that section 10(b) "must be read flexibly, not technically and restrictively." *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. at 12, 92 S.Ct. at 169. We note as well, that a statutory "purchase" or "sale" is not necessarily a technical purchase or sale in the common-law sense. *See, e.g., Herpich v. Wallace*, 430 F.2d 792, 806 (5th Cir. 1970). At the same time, however, the Court has cautioned against too freely allowing causes of action through expanded definitions under the anti-fraud provisions of the Securities Exchange Act. *See, e.g., Santa Fe Industries, Inc. v. Green*, 430 U.S. at 477-78, 97 S.Ct. at 1303. Indeed the Court's recent decisions generally have cut back on the scope

of protection allowed under §10(b).[21] We particularly note the Court's warning in *Blue Chip Stamps* that "the wording of §10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers or sellers of securities, but to the world at large." 421 U.S. at 733 n.5, 95 S.Ct. at 1924 n.5 (emphasis in original).

We are also guided by the *Blue Chip Stamps* assertion that the *Birnbaum* doctrine bars three principal classes of potential plaintiffs from maintaining an action under Rule 10b-5, first, potential purchasers of shares; second, actual shareholders who refrain from selling; and third, shareholders who claim that fraudulent activity decreased the value of their investment. See *Sacks v. Reynolds Securities, Inc.*, 193 U.S.App.D.C. 80, 87, 593 F.2d 1234, 1241 (D.C.Cir. 1978).

---

[21] See *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979) (noncontributory, compulsory pension plan does not constitute a "security" within the meaning of the Securities Acts); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977) (absent deception or manipulation, unfairness or breach of fiduciary duty in connection with a securities transaction does not constitute a 10b-5 cause of action); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977) (tender offeror has not private cause of action for damages under §14(e) of the Securities Exchange Act); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 688 (1976) (no cause of action under 10b-5 for conduct that is merely negligent); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (omitted fact is material under Rule 14a-9 if there is a "substantial likelihood" that the disclosure of the omitted fact would have been viewed by the reasonable investors as having significantly altered the "total mix" of information made available).

The courts have considered a variety of transactions to constitute a purchase or sale under §10(b). In *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970, 88 S.Ct. 463, 19 L.Ed.2d 460 (1967), the Second Circuit held that the plaintiff is a seller when a corporation in which he is a stockholder is merged into the defendant corporation. In *Vine* the plaintiff was a shareholder in Crown Finance Company, most of whose stock had been acquired by Beneficial Finance Corporation, which could effect a short-form merger. Although the plaintiff had retained his shares in Crown Finance, his only remaining right was either to sell his stock for Beneficial's cash offer or to pursue his appraisal rights, which would also result in a cash payment for his shares. The court stated that in order for the plaintiff to realize any value for his stock, as a practical matter, he must eventually become a party to a sale and thus he was a seller under Rule 10b-5. The Second Circuit later applied this "forced seller" rationale to a tender-offer situation in *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822, 91 S.Ct. 41, 27 L.Ed.2d 50 (1970).

We have stated the informing principle of *Vine* to be that "a shareholder should be treated as a seller when the nature of his investment has been fundamentally changed from an interest in a going enterprise into a right solely to a payment of money for his shares." *Dudley v. Southeastern Factor and Finance Corp.*, 446 F.2d 303, 307 (5th Cir.), *cert. denied sub nom. McDaniel v. Dudley*, 404 U.S. 858, 92 S.Ct. 109, 30 L.Ed.2d 101 (1971). We have ourselves adopted the "forced seller" doctrine as outlined in *Vine*. In *Coffee v. Permian Corp.*, 434 F.2d 383 (5th Cir. 1970), 474 F.2d 1040 (5th Cir.), *cert. denied*, 412 U.S. 920, 93 S.Ct. 2736, 37 L.Ed.2d 146

(1973), we found the facts very similar to those in *Vine* and concluded that, as a practical matter, the plaintiff shareholder had no choice but to surrender his interest in the corporation and to exchange his shares for cash, thereby falling within the statutory definition of sale. *See also Dudley v. Southeastern Factor and Finance Corp.*, 446 F.2d 303 (5th Cir.), *cert. denied sub nom. McDaniel v. Dudley*, 404 U.S. 858, 92 S.Ct. 109, 30 L.Ed.2d 101 (1971) (liquidation of corporation constitutes sale of shareholders' shares in it).

Along the same lines, the Supreme Court has held that in an action by the Securities and Exchange Commission the simple exchange of shares in a merger qualifies as a purchase or sale. *SEC v. National Securities, Inc.*, 393 U.S. at 467, 89 S.Ct. at 572. The Sixth Circuit has extended this to the context of private actions, relying heavily upon the reasoning in *Vine*.[22] *Marsh v. Armada Corp.*, 533 F.2d 978 (6th Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 803 (1977). *But see Gaudin v. KDI Corp.*, 576 F.2d 708 (6th Cir. 1978)

---

[22]The Third Circuit has expressed a similar view in *In re Penn Central Securities Litigation, M.D.L. Dkt. No. 56*, 494 F.2d 528 (3d Cir. 1974):

> In such a merger between two corporations, the original shareholders of each corporation end up with stock in a substantially different company with substantially different assets and prospects. The decision to vote in favor of the merger is therefore little different from the decision to sell shares in the original corporation and, with the cash received for those shares, buy shares in the merged corporation. It clearly effectuates the remedial purposes of the securities acts, therefore, to extend their protections to such a share exchange.

(promise not to sell does not give rise to 10b-5 claim). In a related area, the Second Circuit has found the redemption of convertible debentures to be within the meaning of the statute. *Drachman v. Harvey*, 453 F.2d 722 (2d Cir. 1972) (en banc).

We, however, have drawn limits on the "forced seller" doctrine and the merger exchange situation. In *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873, 95 S.Ct. 134, 42 L.Ed.2d 113 (1974), we denied direct standing to a shareholder of a merged company who had the right to exchange his shares for shares of the surviving company. We observed that the plaintiff was still entitled to an interest in a going concern and was not forced to liquidate his interest for value. Consequently, he was not a forced seller. In *Sargent v. Genesco, Inc.*, 492 F.2d 750 (1974), we rejected plaintiffs' argument that the issuance of new shares so diluted their position as shareholders as to give them 10b-5 standing as forced sellers. Our decision there drew upon our earlier opinion in *Wolf v. Frank*, 477 F.2d 467 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973), where we stated that plaintiffs did not have standing to challenge a dilution of equity interest because they were neither purchasers nor sellers in connection with that transaction.

On the other hand, we have found a purchase or sale in other contexts. In *Rekant v. Desser*, 425 F.2d 872 (5th Cir. 1970), we held that a corporation issuing its own treasury shares is an issuer of securities.[23] There

---

[23]The Second Circuit has reached a similar conclusion. See *Schoenbaum v. Firstbrook*, 405 F.2d 215 (1968) (en banc), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906, 89 S.Ct. 1747, 23 L.Ed.2d 219 (1969).

we relied in part on our decision in *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693 (1961), where we held that the issuance of stock in exchange for worthless assets constituted a 10b-5 sale.

At the same time, this Court has not been willing to extend the definition of a purchase or sale as broadly as have other circuits. In *National Bank of Commerce of Dallas v. All American Assurance Co.*, 583 F.2d 1295 (5th Cir. 1978) we held that the pledge of securities as collateral for a commercial loan on a promissory note was not a purchase or sale under 10b-5. In doing so we reaffirmed similar holdings in slightly different contexts. *Reid v. Hughes*, 578 F.2d 634 (5th Cir. 1978); *McClure v. First National Bank*, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, 420 U.S. 930, 95 S.Ct. 1132, 43 L.Ed.2d 402 (1975); *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970). We recognized that other circuits had held roughly similar facts to come within the statute. *National Bank of Commerce of Dallas v. All American Assurance Co.*, 583 F.2d at 1299. *Cf. Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017 (6th Cir. 1979); *Mallis v. FDIC*, 568 F.2d 824 (2d Cir. 1977), *cert. dismissed sub nom. Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978); *United States v. Gentile*, 530 F.2d 461 (2d Cir.), *cert. denied*, 426 U.S. 936, 96 S.Ct. 2651, 49 L.Ed.2d 388 (1976) (holding the pledge of stock as collateral to be a purchase or sale).

Though no single one can be considered determinative, several general considerations emerge from our prior decisions. First, we have usually found §10(b) applicable where there has been some surrendering of ownership or control of the security, while, as in the

case of pledges of stock as collateral, we have found transactions which create encumbrances on the security without altering the underlying ownership interest to be beyond the purview of the statute. Second, we have considered a transaction a purchase or sale where, as in the forced seller context, the nature of the security has been changed in the sense that an interest in an ongoing concern is converted exclusively into a right to cash. At the same time, we have held that transactions which significantly affect the value or condition of the stock without altering its very nature are not actions covered by §10(b). Third, we have looked for actions that have a direct effect on the conduct of the securities market. Where the transaction affects only indirectly the ability of investors to make knowing decisions in an unmanipulated market, we have declined to find the action within the reach of §10(b).

With this broad range of decisions and principles outstanding, we turn to the facts of plaintiff's claim. Plaintiff relies heavily upon the forced seller doctrine, arguing that in connection with the merger there was a purchase by Rockwell and a sale by each debentureholder of his debentures convertible into common stock, and that the sale was effected through an agent, the Trust Company, who acted without authority. Plaintiff further asserts that by virtue of the Supplemental Indenture, the nature of the investment (a security convertible into common stock) "has been fundamentally changed from an interest in a going enterprise into a right solely to a payment of" $344.75.

[26] We are nevertheless not quite persuaded by plaintiff's argument and refrain from extending the

forced seller doctrine, which we have previously construed narrowly, to these facts. Even if we assume that the original debenture called for a right of conversion, we do not feel that the Supplemental Indenture so "substantially changed" the underlying security that it produces a purchase and sale under §10(b). The debentureholders still have a debenture issued by a going concern. Under the Supplemental Indenture, Rockwell affirmed its assumption of Collins' obligations to make punctual payment of the principal and interest on the debentures according to the terms contained in the original issue. Rockwell has not expressly redeemed the securities, and we decline to treat its actions as, in effect, a redemption. Plaintiff has not been forced to sell its debenture. In some respects the situation resembles that of a merger exchange, which we have found beyond the protection of §10(b).

[27] Assuming the prior existence of a conversion right, the Supplemental Indenture, in eliminating that right, may affect the value of the debenture. As we have noted, however, security holders do not automatically have a cause of action under §10(b) to challenge action which affects the value of the security.

We observe also that the purported sale falls short of the other considerations we have articulated when finding §10(b) applicable. At no point did ownership or control of the debenture change hands. Indeed, Rockwell informed debentureholders that there would be no need to exchange the old debentures for amended ones. At all times the debentureholders possessed a debenture backed by an ongoing premise to pay principal and interest. In addition, the transaction involving the Supplemental Indenture did not directly affect the ability

of investors to make knowing decisions in an unmanipulated market.

Finally, we observe that the transaction involving the Supplemental Indenture most resembles that which it claims to be—a contractual modification of an ongoing agreement. Acting on behalf of the debentureholders, the Trust Company entered into an agreement with Rockwell to amend the basic debenture agreement to reflect Collins' merged status and the current nature of the conversion right. Were it not in the securities context this action would be treated simply as a subsequent agreement by the parties to amend their basic contract. It would not be called an exchange of the old contract for the new. We see no reason to stretch the usual way of viewing the transaction solely because the underlying contract involved a security.

[28] As we saw elsewhere in this opinion, plaintiff may be able to prove a claim for breach of contract or breach of fiduciary duty based on the defendants' conduct in seeking to modify the original contractual arrangement, but the existence of such a claim does not mean that plaintiff may bring a 10b-5 action. The Supreme Court in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 held that unfairness in a securities transaction was not necessarily enough to create a 10b-5 cause of action and refused to permit a cause of action under 10b-5 for an alleged breach of corporate fiduciary duty. In an extensive examination of standing under Rule 10b-5 in *Herpich v. Wallace*, 430 F.2d at 805, we pointed out that §10(b) and Rule 10b-5 "do not proscribe all fraudulent schemes concocted to take undue advantage of investors." We went on to observe, "That the conduct complained of may be

reprehensible does not require the conclusion that federal remedy must be furnished." *Id.* at 809. Rather, the objectives of the Rule are purity of the securities transaction and the securities trading process. We summarized the congressional intent as follows: "Congress meant to afford investors a reasonable opportunity to make knowing, intelligent decisions regarding their purchases and sales of securities in unmanipulated markets." *Id.* at 806.

Employing similar reasoning, the Seventh Circuit has also refused to extend Rule 10b-5 to certain breaches of fiduciary or contractual duties. *O'Brien v. Continental Illinois National Bank & Trust Co.*, 593 F.2d 54 (7th Cir. 1979). The Ninth Circuit has likewise observed that not all fraudulent activities fall within the reach of the Rule. *Ohashi v. Verit Industries*, 536 F.2d 849 (9th Cir.), *cert. denied*, 429 U.S. 1004, 97 S.Ct. 538, 40 L.Ed.2d 616 (1976). *See also Sacks v. Reynolds Securities, Inc.*, 193 U.S.App. D.C. 80, 593 F.2d 1234 (D.C.Cir.1978).

Finally, in limiting the reach of the anti-fraud provisions of the federal securities law, the Court has relied heavily upon the fact that certain causes of action, such as breach of contract or breach of fiduciary duty, are traditionally matters of state law. *Santa Fe Industries v. Green*, 430 U.S. at 478, 97 S.Ct. at 1304; *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 524 (1977). The *Santa Fe* Court, for example, declined to superimpose federal fiduciary standards that "would overlap and quite possibly interfere with state corporate law." 430 U.S. at 479, 97 S.Ct. at 1304.

Plaintiff's claim in connection with the 1973 Supplemental Indenture consists of traditional state

law claims for breach of contract and breach of fiduciary obligations. The Supplemental Indenture and Rockwell's and Collins' actions in connection therewith possibly entailed a breach of the original debenture agreement's provision concerning the nature of the conversion right in the event of a merger, while the Trust Company's actions may have been a breach of its fiduciary responsibilities under the indenture. But these are the types of claims the courts have felt best left to state law in the absence of express direction to the contrary by Congress. The defendants' activities sought to affect their relation with the debentureholders as debentureholders; they were not directed to the manipulation of the market. Their action cannot be said to have a direct effect on an investor's ability to make knowing, intelligent purchases or sales. Plaintiff must therefore be left to his state law remedies.[24]

B. *Scienter*

Since plaintiff is a purchaser under Count I, alleging a 10b-5 violation connection with the defendants' failure to disclose that the original debenture conversion right would terminate upon the merger of Collins, we now examine whether the defendants' conduct comes within the prohibition of the Rule.

Section 10(b) proscribes the use of "any manipulative or deceptive device or contrivance"[25] in contravention

---

[24]Because we find that there was no purchase or sale, we do not reach the District Court's determination of the issue of damages under 10b-5.

[25]See note 16 *supra*.

of Commission rules. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 688, the Supreme Court read §10(b) to require an element of scienter[28] and refused to impose liability for negligent conduct alone. The Court noted that the statute employed "the commonly understood terminology of intentional wrongdoing" and that its history reflected "no more expansive intent." *Id.* at 214, 96 S.Ct. at 1391. The Court reaffirmed this view of the statute in *Santa Fe Industries v. Green*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480. There the Court examined the use of the term "fraud" in Rule 10b-5 and rejected the argument that it includes all breaches of fiduciary duty in connection with a securities transaction. Rather, a claim of fraud states a cause of action under Rule 10b-5 "only if the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute." *Id.* at 473-74, 97 S.Ct. at 1301.

While the Court in *Ernst & Ernst* held that negligence was not sufficient to bring conduct within the prohibition of 10b-5, the Court expressly withheld its opinion on whether recklessness was sufficient to meet the statute's scienter requirement. 425 U.S. at 193-94 n. 12, 96 S.Ct. at 1381 n. 12. Nevertheless, the Court acknowledged that in other contexts recklessness is considered to be a form of intentional conduct imposing liability. *Id.* Although we have not previously given extended analysis to liability for recklessness under 10b-5, we have intimated that recklessness meets the scienter requirement. *First Virginia Bankshares v. Benson*,

[28]In *Ernst & Ernst* the Court defined scienter to refer to "a mental state embracing intent to deceive, manipulate, or defraud." 425 U.S. at 194, 96 S.Ct. at 1381 n. 12.

559 F.2d 1307, 1314 (5th Cir. 1977), *cert. denied*, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1978). *See also Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir.), *cert. denied*, 434 U.S. 911, 98 S.Ct. 312, 54 L.Ed.2d 197 (1977). Other circuits have expressly held that recklessness is a sufficiently culpable state of mind for liability under §10(b) and Rule 10b-5. *See, e.g., Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1023 (8th Cir. 1979); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 44 (2d Cir.), *cert. denied*, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 698 (1978); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1039-40 (7th Cir.), *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977).

[29] We are quick to point out that reckless conduct describes "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sanders v. John Nuveen & Co., Inc.*, 554 F.2d 790, 793 (7th Cir. 1977). Similarly, we agree with the Seventh Circuit that "reckless behavior" must not be so liberally construed as to obliterate any discernible distinction between scienter and negligence. *Id.* at 793.

[30, 31] To sustain a cause of action under §10b-5, then, plaintiffs must show that defendants intentionally or recklessly failed to disclose material information. Without reaching the issue of whether the failure to state that the conversion right would terminate upon a subsequent cash merger of Collins constituted a material

omission,[27] we do hold that plaintiff has produced no evidence to support a jury finding that the defendants acted with the requisite intent or recklessness.

First, defendant Trust Company was not a party to the original issue, having assumed its role as Trustee in 1970. No evidence linked the Trust Company to the preparation, drafting, approving, or publishing of the indenture agreement, prospectus, or related documents. What testimony there was about these documents was not admitted against the Trust Company. There is as well no testimony to link the Trust Company with any review of the documents affecting sales after the original ones in 1967. To be sure, there was testimony concerning the Trust Company's review of the debenture offering and preparation of documents in 1973, but this testimony goes to the alleged fraud in connection with the Supplemental Indenture, which we have held not to be a purchase or sale. With no evidence implicating the Trust Company in the issuance of the original debentures, the 10b-5 claim against it must fail.

Second, plaintiff introduced no evidence from which it could be inferred that defendants Rockwell or Collins acted unlawfully. The evidence tended to show that neither Collins nor the debentureholders actively considered the prospect of a cash merger of Collins somewhere, sometime down the road. Indeed, at the time of the offering, cash mergers were not permitted under Iowa law. In retrospect, it would have been fine

---

[27] *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *see also Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974); *cert. denied*, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975).

if Collins had considered that possibility and drafted a provision stating what would happen in such event. Had it done so, this case probably would not now be before us. But Collins' failure to do so, though highly inconvenient now, cannot be viewed as anything more than simple negligence. It surely does not approach recklessness. We are reluctant to hold that debenture issuers must, under threat of 10b-5 penalty, explicitly anticipate every circumstance possible—even a change of those which are currently illegal—involving the issuers and the debenture.

Also, there is no testimony to support the contention that defendants Rockwell and Collins engaged in a continuing course of conduct to deceive subsequent purchasers of the securities. No testimony was offered to show that Rockwell or Collins considered the conversion issue prior to the discussion of the proposed merger. As was the case with the Trust Company, the evidence produced went to the alleged fraud and deception in connection with the execution and issuance of the Supplemental Indenture.

We thus affirm the dismissal of Count I for failure to produce evidence of scienter.

Conclusion

The Judgment of the District Court is, as herein set forth, AFFIRMED IN PART and IN PART REVERSED and REMANDED for further proceedings not inconsistent herewith.

APPENDIX

ARTICLE FOUR

Conversion of Debentures

SECTION 4.01. Subject to and upon compliance with the provisions of this Article Four, at the option of the holder thereof, any Debenture or any portion of the principal amount thereof which is $1,000 or a multiple of $1,000, may, at any time at or before the close of business on January 1, 1987, or in case such Debenture or portion thereof shall have been called for redemption prior to such date, then in respect of such Debenture or portion thereof until and including, but (unless the Company shall default in payment due upon the redemption thereof) not after, the close of business on the fifth day prior to the redemption date, be converted at the principal amount thereof, or of such portion thereof, into fully paid and non-assessable shares (calculated as to each conversion to the nearest 1/100th of a share) of Common Stock of the Company, at the conversion price, determined as hereinafter provided, in effect at the time of conversion.

The price at which shares of Common Stock shall be delivered upon conversion (herein called the "conversion price") shall be initially $72.50 per share of Common Stock. The conversion price shall be reduced in certain instances as provided in paragraphs (a), (g)

and (h) of Section 4.04, and shall be increased in certain instances as provided in paragraph (h) of Section 4.04.

* * * * *

SECTION 4.11. In case of any consolidation of the Company with, or merger of the Company into, any other corporation (other than a consolidation or merger in which the Company is the continuing corporation), or in case of any sale, conveyance, transfer or other disposition to any other corporation of the property and assets of the Company as an entirety or substantially as an entirety, the corporation formed by such consolidation or the corporation into which the Company shall have been merged or the corporation which shall have acquired such property and assets, as the case may be, shall execute and deliver to the Trustee a supplemental indenture (which shall conform to the applicable provisions of the Trust Indenture Act of 1939 as then in effect) providing that the holder of each Debenture then outstanding shall have the right (until the expiration of the conversion right of such Debenture) to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such consolidation, merger, sale, conveyance, transfer or disposition by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such consolidation, merger, sale, conveyance, transfer or disposition. Such supplemental indenture shall provide for adjustments which shall be as nearly equivalent as may be practicable to the adjustments provided for in this Article Four. The above provisions of this Section 4.11 shall similarly

apply to successive consolidations, mergers, sales, conveyances, transfers or dispositions.

SECTION 4.12. The Trustee, subject to the provisions of Section 10.01, and any conversion agent shall not at any time be under any duty or responsibility to any holder of Debentures to determine whether any facts exist which may require any adjustment of the conversion price, or with respect to the nature or extent of any such adjustment when made, or with respect to the method employed, or herein or in any supplemental indenture provided to be employed, in making the same. Neither the Trustee nor any conversion agent shall be accountable with respect to the validity or value (or the kind or amount) of any shares of Common Stock, or of any securities of property, which may at any time be issued or delivered upon the Conversion of any Debenture; and neither the Trustee nor any conversion agent makes any representation with respect thereto. The Trustee, subject to the provisions of Section 10.01, and any conversion agent shall not be responsible for any failure of the Company to issue, transfer or deliver any shares of Common Stock or stock certificates or other securities or property upon the surrender of any Debenture for the purpose of conversion or to comply with any of the covenants of the Company contained in this Article Four.

ARTICLE TEN

Concerning the Trustee

SECTION 10.01. The Trustee, prior to the occurrence of an Event of Default and after the curing of all Events of Default which may have occurred,

undertakes to perform such duties and only such duties as are specifically set forth in this Indenture. In case an Event of Default has occurred (which has not been cured) the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

The Trustee, upon receipt of all resolutions, certificates, statements, opinions, reports, documents, orders or other instruments furnished to the Trustee pursuant to any provision of this Indenture, shall examine them to determine whether they conform to the requirements of this Indenture.

No provision of this Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act, or its own wilful misconduct, except that

(a) prior to the occurrence of an Event of Default and after the curing of all such Events of Default which may have occurred:

(1) the duties and obligations of the Trustee shall be determined solely by the express provisions of this Indenture, and the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Indenture, and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(2) in the absence of bad faith on the part of the Trustee, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture;

(b) the Trustee shall not be personally liable for any error of judgment made in good faith by a responsible officer or responsible officers of the Trustee, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts; and

(c) the Trustee shall not be personally liable with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the holders of not less than a majority in principal amount of the Debentures at the time outstanding (determined as provided in Section 11.04) relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee, under this Indenture.

None of the provisions contained in this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur personal financial liability in the performance of any of its duties or in the exercise of any of its rights or powers, if there is reasonable ground for believing that the repayment of such funds or liability is not reasonably assured to it.

SECTION 10.02. Except as otherwise provided in Section 10.01:

(a) The Trustee may rely and shall be protected in acting or refraining from acting upon any resolution, Officers' Certificate, certificate of auditors, or any other certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, appraisal, bond, debenture or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(b) Any request, direction, order or demand of the Company mentioned herein shall be sufficiently evidenced by an instrument signed in the name of the Company by the Chairman, the President, the Chairman of the Executive Committee or any Vice President and the Secretary or an Assistant Secretary, the Comptroller or a Deputy Comptroller or the Treasurer or an Assistant Treasurer (unless other evidence in respect thereof be herein specifically prescribed); and any resolution of the Board of Directors of the Company may be evidenced to the Trustee by a copy thereof certified by the Secretary or an Assistant Secretary of the Company;

(c) The Trustee may consult with counsel and the advice of such counsel or any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it

hereunder in good faith and in accordance with such advice or such Opinion of Counsel;

(d) The Trustee shall be under no obligation to exercise any of the trusts or powers vested in it by this Indenture at the request, order or direction of any of the Debentureholders, pursuant to the provisions of this Indenture, unless such Debentureholders shall have offered to the Trustee reasonable security or indemnity against the costs, expenses and liabilities which may be incurred therein or thereby; provided that nothing herein contained shall, however, relieve the Trustee of the obligation, upon the occurrence of an Event of Default (which has not been cured or waived) to exercise such of the rights and powers vested in it by this indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs;

(e) The Trustee shall not be personally liable for any action taken or omitted by it in good faith and believed by it to be authorized or within the discretion or rights or powers conferred upon it by this Indenture;

(f) Prior to the occurrence of an Event of Default hereunder and after the curing of all Events of Default, the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, appraisal,

bond, debenture or other paper or document, unless requested in writing so to do by the holders of not less than a majority in principal amount of the Debentures then outstanding; provided, however, that if the payment within a reasonable time to the Trustee of the costs, expenses or liabilities likely to be incurred by it in the making of such investigation is, in the opinion of the Trustee, not reasonably assured to the Trustee by the security afforded to it by the terms of this Indenture, the Trustee may require reasonable indemnity against such expense or liability as a condition to so proceeding. The reasonable expense of every such examination shall be paid by the Company or, if paid by the Trustee, shall be repaid by the Company upon demand;

(g) The Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents or attorneys.

ARTICLE THIRTEEN

Supplemental Indentures

SECTION 13.01. The Company, when authorized by a resolution of its Board of Directors, and the Trustee, subject to the conditions and restrictions in this Indenture contained, may from time to time and at any time enter into an indenture or indentures supplemental hereto (which shall conform to the applicable provisions of the

Trust Indenture Act of 1939 as then in effect) for one or more of the following purposes:

(a) to make provision with respect to the conversion rights of holders of Debentures pursuant to the requirements of Section 4.11;

(b) to evidence the succession of another corporation to the Company, or successive successions, and the assumption by the successor corporation of the covenants, agreements and obligations of the Company pursuant to Article Fourteen;

(c) to add to the covenants and agreements of the Company in this Indenture contained such further covenants and agreements thereafter to be observed, and (subject to Section 17.03) to surrender any right or power herein reserved to or conferred upon the Company;

(d) to cure any ambiguity or to correct or supplement any defective or inconsistent provision contained in this Indenture or in any supplemental indenture; and

(e) to make such provisions with respect to matters or questions arising under this Indenture as may be necessary or desirable and not inconsistent with this Indenture; provided that such action shall not adversely affect the interests of the holders of any of the Debentures.

The Trustee is hereby authorized to join in the execution of any supplemental indenture authorized or permitted by the terms of this Indenture, to make any further appropriate agreements and stipulations which may be therein contained, but the Trustee shall not be obligated to enter into any such supplemental indenture which affects the Trustee's own rights, duties or immunities under this Indenture or otherwise.

Any supplemental indenture authorized by the provisions of this Section 13.01 may be executed by the Company and the Trustee without the consent of the holders of any of the Debentures at the time outstanding, notwithstanding any of the provisions of Section 13.02.

SECTION 13.02. With the consent (evidenced as provided in Section 11.01) of the holders (or persons entitled to vote, or to give consents respecting the same) of not less that 66⅔% in aggregate principal amount of the Debentures at the time outstanding, the Company, when authorized by a resolution of its Board of Directors, and the Trustee may from time to time and at any time enter into an indenture or indentures supplemental hereto (which shall conform to the applicable provisions of the Trust Indenture Act of 1939 as then in effect) for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of any supplemental indenture or of modifying in any manner the rights and obligations of the holders of the Debentures and of the Company; provided, however, that no such supplemental indenture shall (i) extend the fixed maturity of any Debentures, or reduce the principal amount thereof, or reduce the rate or extend the time of payment of interest thereon, or reduce any premium payable upon the

redemption thereof, or alter or impair the right to convert the same into Common Stock at the prices and upon the terms provided in this Indenture, without the consent of the holder of each Debenture so affected, or (ii) reduce the aforesaid percentage of Debentures, the holders of which are required to consent to any such supplemental indenture, without the consent of the holders of all Debentures then outstanding.

Upon the request of the Company, accompanied by a copy of a resolution of its Board of Directors certified by the Secretary or an Assistant Secretary of the Company authorizing the execution of any such supplemental indenture, and upon the filing with the Trustee of evidence of the consent of Debentureholders as aforesaid, the Trustee shall join with the Company in the execution of such supplemental indenture unless such supplemental indenture affects the Trustee's own rights, duties or immunities under this Indenture or otherwise, in which case the Trustee may in its discretion but shall not be obligated to enter into such supplemental indenture.

It shall not be necessary for the consent of the Debentureholders under this Section 13.02 to approve the particular form of any proposed supplemental indenture, but it shall be sufficient if such consent shall approve the substance thereof.

Promptly after the execution by the Company and the Trustee of any supplemental indenture pursuant to the provisions of this Section 13.02, the Company shall mail, first class postage prepaid, to the holders of Debentures at their last addresses as they shall appear upon the register or registers, a notice, setting forth in

general terms the substance of such supplemental indenture. Any failure of the Company to mail such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such supplemental indenture.

SECTION 13.03. Upon the execution of any supplemental indenture pursuant to the provisions of this Article Thirteen or of Section 4.11 or of Section 14.01, this Indenture shall be and be deemed to be modified and amended in accordance therewith and the respective rights, limitations of rights, obligations, duties and immunities under this Indenture of the Trustee, the Company and the holders of Debentures shall thereafter be determined, exercised and enforced hereunder subject in all respects to such modifications and amendments, and all the terms and conditions of any such supplemental indenture shall be and be deemed to be part of the terms and conditions of this Indenture for any and all purposes.

SECTION 13.04. Debentures authenticated and delivered after the execution of any supplemental indenture pursuant to the provisions of this Article Thirteen or of Section 4.11 or of Section 14.01 or after any action taken at a Debentureholders' meeting pursuant to Article Twelve, may bear a notation in form approved by the Trustee as to any matter provided for in such supplemental indenture or as to any action taken at any such meeting; and, in such case, suitable notation may be made upon outstanding Debentures after proper presentation and demand. If the Company or the Trustee shall so determine, new Debentures so modified as to conform, in the opinion of the Trustee and the Board of Directors of the Company, to any modification of this

Indenture contained in any such supplemental indenture, or to any action taken at any such meeting, may be prepared by the Company, authenticated by the Trustee and delivered in exchange for the Debentures then outstanding, upon demand of, and without cost to, the holders thereof, upon surrender of such Debentures.

SECTION 13.05. The Trustee, subject to the provisions of Section 10.01, may receive an Opinion of Counsel as conclusive evidence that any supplemental indenture executed pursuant to this Article Thirteen is authorized or permitted by the terms of this Indenture and that it is not inconsistent therewith.

ARTICLE FOURTEEN

Consolidation, Merger and Sale

SECTION 14.01. Nothing in this Indenture shall prevent any consolidation or merger of the Company with or into any other corporation or corporations (whether or not affiliated with the Company), or successive consolidations or mergers in which the Company or its successor or successors shall be a party or parties, or shall prevent any sale, conveyance, transfer or other disposition (or successive sales, conveyances, transfers or other dispositions) of the property and assets of the Company (or of its successor or successors) as an entirety or substantially as an entirety, to any other corporation (whether or not affiliated with the Company) authorized to acquire the same; provided, however, and the Company hereby covenants and agrees, that upon any such consolidation, merger, sale, conveyance, transfer or other disposition, the due and punctual payment of the principal of (and premium, if any) and interest on all of the

Debentures, according to their tenor, and the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture to be performed or observed by the Company, shall be expressly assumed, by indenture supplemental hereto, satisfactory in form to the Trustee, executed and delivered to the Trustee by the corporation formed by such consolidation, or by the corporation into which the Company shall have been merged, or by the corporation which shall have acquired such property and assets. In the event of any such sale, conveyance, transfer or other disposition, the predecessor Company may be dissolved, wound up and liquidated at any time thereafter.

SECTION 14.02. In case of any such consolidation, merger, sale, conveyance, transfer or other disposition, and upon the execution by the successor corporation of an indenture supplemental hereto, as provided in Section 14.01, and upon compliance by such successor corporation with all applicable provisions of Section 4.11, such successor corporation shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as the party of the first part. Such successor corporation thereupon may cause to be signed, and may issue either in its own name or in the name of the Company, with such suitable reference, if any, to such consolidation, merger, sale, conveyance, transfer or other disposition as may be required by the Trustee, any or all of the Debentures issuable hereunder which theretofore shall not have been signed by the Company and delivered to the Trustee; and, upon the written order of such successor corporation, instead of the Company, and subject to all the terms, conditions and limitations in this Indenture prescribed, the Trustee shall authenticate and shall deliver any Debentures which previously shall

have been signed and delivered by the officers of the Company to the Trustee for authentication, and any Debentures which such successor corporation thereafter shall cause to be signed in accordance with the provisions of this Indenture and delivered to the Trustee for that purpose. All the Debentures so issued shall in all respects have the same legal rank and benefit under this Indenture as the Debentures theretofore or thereafter issued in accordance with the terms of this Indenture as though all of such Debentures had been issued at the date of the execution hereof.

In case of any such consolidation, merger, sale, conveyance, transfer or other disposition, such changes in phraseology and form (but not in substance) may be made in the Debentures thereafter to be issued as may be appropriate.

Nothing contained in this Indenture or any of the Debentures shall prevent the Company from consolidating or merging into itself, or acquiring by purchase or otherwise all or any part of the property of, any other corporation (whether or not affiliated with the Company).

SECTION 14.03 The Trustee, subject to the provisions of Sections 10.01 and 10.02, may receive an Opinion of Counsel as conclusive evidence that any such consolidation, merger, sale, conveyance, transfer or other disposition, and any such assumption, complies with the provisions of this Article Fourteen.

Harold J. GUIDRY,
Plaintiff-Appellee,

v.

SOUTH LOUISIANA CONTRACTORS, INC.,
a/k/a Soloco, Inc., and Liberty Mutual Insurance Co.,
Defendants-Appellants,
South Louisiana Contractors, Inc., a/k/a Soloco, Inc.,
Defendant-Appellee,
J. P. Messina Contractors and Hartford Insurance Co.,
Defendants-Appellants.

No. 77-3435.

United States Court of Appeals,
Fifth Circuit.

March 24, 1980.

Rehearing and Rehearing En Banc
Denied April 22, 1980.

Barge cook, whose request to be assigned to onshore work when employer's dragline was rented by excavating contractor was honored, sued the contractor and dragline owner seeking recovery under Jones Act, in which owner and contractor sought indemnity from each other. The United States District Court for the Western District of Louisiana, W. Eugene Davis, 444 F.Supp. 850, rendered judgment for cook, and denied indemnity claims, and defendants appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) absent showing of joint fault there was no right of indemnity between owner and contractor; (2) although cook's prior relationship to barge and expectation of returning thereto were necessary conditions to establish seaman status they were not alone sufficient for Jones Act coverage; and

(3) owner's relationship to cook under Jones Act and its relationship to its barge captain, who was operating dragline at time of injury and for whose acts owner was sought to be held vicariously liable, were not governed by the same criteria.

Affirmed in part, reversed in part and remanded.

1. Contribution—5(6)
   Indemnity—13.2(6)

Where either dragline owner or contractor which rented dragline, but not both, was responsible for negligence of dragline operator, the employer found vicariously liable for operator's actions would have no implied right to claim indemnity from anyone other than the operator himself and there could be no contribution between the employers because there was no joint fault.

2. Seamen—29(5.3)

Only seamen are entitled for benefits of Jones Act. Jones Act, 46 U.S.C.A. §688.

3. Seamen—2

Traditional formulation of the requirements for identifying a seaman for Jones Act purposes are: he must have a more or less permanent connection with; a vessel in navigation; and the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips. Jones Act, 46 U.S.C.A. §688.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-74-437-D

DAVID BROAD, ET AL,

Plaintiffs

v.

ROCKWELL INTERNATIONAL
CORPORATION, ET AL,

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa and 28 U.S.C. §§1331, 1337, and under principles of pendent jurisdiction, *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Count I

2. Count I of the complaint alleges a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, 15 U.S.C. 78j(b) and 17 C.F.R. 240.10b-5, *i.e.*, that defendants engaged in a continuing course of conduct from 1967 until October 1973 to omit to disclose certain material facts to the purchasers of Collins Radio Company 4⅞% Convertible Subordinated Debentures due January 1, 1987, in particular that in the event Collins merged into, consolidated with or was acquired by another corporation the successor corporation could substitute a right to

convert into cash for the debenture-holders' right to convert into common stock without their consent and without redeeming the debentures, if the common shareholders received cash in the merger.

[2917]

3. Scienter is an essential element of this claim. The record is devoid of evidence from which reasonable men could find that any defendant intended to deceive the purchasers of the debentures in the 1967 offering or subsequent thereto. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

4. Whether the standard for scienter is intentional deception or recklessness, the record is devoid of evidence from which reasonable men could find that any defendant acted with scienter in the offering of the debentures in 1967 or subsequent thereto. *See Sanders v. John Nuveen & Co.*, CCH Fed. Sec. L. Rep. ¶96,030 (7th Cir. 1977); *cf. Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir. 1977).

5. In addition, United States Trust Company did not become trustee until May 22, 1970. It had no duty to disclose the existence of a fact allegedly omitted from the 1967 Collins prospectus. *Vogel v. Brown*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,831 (S.D.N.Y. 1974).

Count II

6. Count II of the complaint alleges violations of Section 10(b) of the 1934 Act and Rule 10b-5, and pendent claims of breach of fiduciary duty and breach of contract. Plaintiffs asserted that the defendants schemed to defraud

the debenture-holders out of their right to convert the debentures into common stock and to substitute a right to convert the debentures into cash, in connection with the merger of Collins into Rockwell in 1973. Plaintiffs asserted that this alleged scheme was in violation of defendants' duties to deal fairly and in good faith with the debenture-holders in breach of the debenture contract and fiduciary duty. Plaintiffs added a claim of unconstitutional impairment of rights under a debenture contract in the pretrial order filed with the Court on June 30, 1977.

Section 10(b) Claim

7. Plaintiffs' Count II, Section 10(b) claim fails for each of three independent reasons.

8. First, here as with respect to Count I, the record is devoid of evidence from which reasonable men could find that any defendant acted with scienter in connection with the 1973 merger of Collins into Rockwell. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Sanders v. John Nuveen & Co.*, CCH Fed. Sec. L. Rep. ¶96,030 (7th Cir. 1977); *cf. Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir. 1977). (See Conclusions 3 and 4, *supra*).

9. Second, plaintiff's claim fails because Rockwell correctly construed the Indenture in 1973 and thus the rights of the Collins debenture-holders were fully respected when Rockwell and Collins merged. *Brucker v. Thyssen-Bornemisza Europe N.V.*, 424 F.Supp. 679 (S.D.N.Y. 1976), *aff'd* ____ F.2d ____ (2d Cir. May 2, 1977); *B.S.F. Co. v. Philadelphia National Bank*, 42 Del. Ch. 106, 204 A.2d 746 (Del. 1964).

10. Third, the wrongs alleged in Count II of the complaint did not occur in connection with a purchase or sale of a security. The rights of the Collins debenture-holders in a merger transaction were predetermined by the provisions of the Indenture executed in 1967. The merger did not constitute a separate purchase or sale by the Collins debenture-holders within the scope of Section 10(b). *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 732 (1975); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 593 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974). See *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 194 (3rd Cir. 1976).

Breach of Debenture Contract Claim

11. Plaintiff's contractual rights were set forth in detail in the Indenture which the debenture certificate referred to and incorporated. Neither plaintiffs' complaint nor the pretrial order filed June 30, 1977, contained allegations that the Indenture or any of its provisions was ambiguous. However, even if plaintiffs had timely raised such an issue, the Court is of the opinion that the Indenture provisions governing the debenture-holders' conversion rights upon a merger are not ambiguous. Those rights can be ascertained from the four corners of the instrument.

12. The Court's conclusion (*supra*, Conclusion 9) that Rockwell correctly construed the Indenture in 1973 is dispositive of plaintiffs' breach of contract claim against all defendants.

Claim of Breach of Fiduciary Duty

13. Rockwell owed a duty to the Collins debenture-holders, as well as the shareholders of Collins, and the shareholders of Rockwell to interpret the Indenture to give all involved parties what they were legally entitled to.

14. The Court is of the opinion that Rockwell would fulfill its duty to the Collins debenture-holders by interpreting fairly and honestly the contractual provisions governing their rights—the Indenture which Rockwell inherited from Collins—so that the debenture-holders received that to which they were entitled upon the merger. *The Indenture mandated that the conversion rights upon a merger become a right to convert into that which the Collins shareholders received in the merger. Rockwell did provide the debenture-holders with such a right.* In the Court's opinion, Rockwell's interpretation was fair, reasonable and correct and thus it fulfilled all of Rockwell's obligations and duties to plaintiffs. *Fershtman v. Schectman*, 450 F.2d 1357 (2d Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972); *Ryan v. J. Walter Thompson Co.*, 453 F.2d 444 (2d Cir. 1971), *cert. denied*, 406 U.S. 907 (1972). Furthermore, the record is devoid of evidence from which reasonable men could conclude that Rockwell acted with any intent other than an intent to interpret the underlying contractual documents fairly, reasonably and correctly.

15. The Trust Company had only those duties specified in the Indenture. The Trust Company performed all duties and obligations required of it by the Indenture and the Trust Indenture Act of 1939, 15 U.S.C. §77aaa *et seq.; Browning Debentureholders Committee v. DASA*

Corp., (Current Vol.) CCH Fed. Sec. L. Rep. ¶95,405 (S.D.N.Y. 1976).

Claim of Unconstitutional Impairment of Contract Rights

16. The 1970 amendment to the Iowa law which permitted cash mergers is constitutional.

Damages

17. The measure of damages for a violation of Section 10(b) is the "actual damage," if any, sustained by a plaintiff. It is the difference in value between what a plaintiff paid upon his purchase or parted with on a sale and the value of what he actually received on the purchase or sale. Securities Exchange Act, Section 28, 15 U.S.C. §78bb; *Wolf v. Frank*, 477 F.2d 467, 478 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973).

18. The record is devoid of evidence from which reasonable men could find "actual damage," with respect to either count of the complaint. With respect to Count I, the record is devoid of evidence from which reasonable men could find that the debenture-holders paid more for the debentures than they would have paid had the allegedly omitted fact been disclosed at the time of purchase. There was no evidence from which reasonable men could conclude that the actual value of the debentures was less than the purchase price at any date of purchase. With respect to Count II, the record is devoid of evidence from which reasonable men could find that the debenture-holders suffered any actual monetary damages resulting from the merger of Collins into Rockwell or the treatment accorded the debenture-holders on the merger. Nor is

there evidence from which reasonable men could find that the debentures were worth less after the Rockwell-Collins merger than they were worth before.

19. The primary relief requested by plaintiff at trial was equitable in nature, *i.e.*, redemption of the debentures. The Court is of the opinion that such relief would be inappropriate under either count of the complaint even if the plaintiffs had prevailed. The debentures are still outstanding as obligations of Rockwell with a fixed maturity date, bearing interest and traded over the New York Stock Exchange. The wrongs alleged were depriving the debenture-holders of the only one aspect of the debenture, *i.e.*, the right to convert into common stock or failing to disclose to the debenture holders that the right to convert into common stock might end on a cash merger. *The appropriate remedy for such wrongs would be monetary damages, the actual damage, if any, sustained by plaintiffs. The adequacy of the remedy at law makes equitable relief inappropriate. In addition, money damages could have been provided to all members of the class, those who still hold the debentures and those who sold after the merger, whereas equitable relief could not be.*

20. Plaintiffs also requested the equitable remedy of restoration of the conversion privilege into common stock. The Court is of the opinion that this relief would also be inappropriate even if the Court had concluded that plaintiffs had been wrongly deprived of that right, *since actual damages would be an appropriate and adequate legal remedy. In addition, the right could not be restored to those who have sold their debentures.*

21. As to plaintiffs' other damage theories, the record is devoid of evidence from which reasonable men would find: (1) that the contractual conditions precedent to any acceleration of the debt have occurred, (2) that Collins paid a lower interest rate from 1967 forward by reason of the alleged omission in the prospectus, (3) that Rockwell profited in any way from the treatment of the debenture-holders' conversion right on the merger, or (4) that any consideration of an exchange offer for the debentures prior to the merger was related to the conversion privilege upon a merger of establishes damages with respect thereto.

22. The absence of proof of damages is a further ground for the direction of a verdict on both counts.

Dated this 19 day of August, 1977.

/s/ Robert M. Hill

United States District Judge

Opposition

1

Office - Supreme Court, U.S.
FILED
OCT 1 1981
ALEXANDER L. STEVAS
CLERK

No. 81-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID BROAD,

Petitioner,

—vs.—

ROCKWELL INTERNATIONAL CORPORATION, COLLINS RADIO COMPANY and UNITED STATES TRUST COMPANY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF ROCKWELL INTERNATIONAL CORPORATION, COLLINS RADIO COMPANY AND THE INDIVIDUAL RESPONDENTS

DONALD I STRAUBER
EDWIN D. SCOTT
30 Rockefeller Plaza
New York, New York 10112
(212) 541-5800

Attorneys for Rockwell International Corporation, Collins Radio Company and the Individual Respondents

TERRY A. THOMPSON
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10112
and
ERNEST E. FIGARI, JR.
JOHNSON SWANSON & BARBEE
4700 First International Building
Dallas, Texas 75202
Of Counsel.

September 30, 1981

QUESTION PRESENTED

Petitioner presents no issue worthy of certiorari. No federal question is raised. No conflict between courts, federal or state, exists. No new law was made. Petitioner offers only his frivolous interpretation of one contract provision, an argument refuted by elementary principles of law and by petitioner's own undisputed evidence. In these circumstances, the Petition raises only one question:

Should this Court grant certiorari where the District Court and the Court of Appeals *en banc* (twenty-four of twenty-five judges joining in the court's opinion) applied substantial and conclusive contract law precedent to the standard provisions of a corporate indenture?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	iii
Table of Authorities	iv
Preliminary Statement	1
Absence of Constitutional or Statutory Issues	2
Statement of the Case	2
(a) The Facts	2
(b) The *En Banc* Decision of the Court of Appeals	4
Reasons for Denying the Writ	5
I. PETITIONER'S ARGUMENT IS REFUTED BY ELEMENTARY PRINCIPLES OF LAW AND BY HIS OWN UNCONTROVERTED EVIDENCE	5
II. PETITIONER IGNORES THE CONCLUSIVE PRECEDENT UNDERLYING THE DECISIONS BELOW	7
Conclusion	9
Rule 28.1 Listing of Subsidiaries and Affiliates of Rockwell International Corporation	10
Certificate of Service	11

TABLE OF AUTHORITIES

CASES	PAGE
Broenen v. *Beaunit Corp.*, 440 F.2d 1244 (7th Cir. 1970)	8
Brucker v. *Thyssen-Bornemisza, N.V.*, 424 F. Supp. 679 (S.D.N.Y. 1976), *aff'd sub nom. Brucker* v. *Indian Head, Inc.*, 559 F.2d 1202 (2d Cir.), *cert. denied*, 434 U.S. 897 (1977)	8
B.S.F. Co. v. *Philadelphia National Bank*, 42 Del. Ch. 106, 204 A.2d 746 (Del. 1964)	8
Harff v. *Kerkorian*, 324 A.2d 215 (Del. Ch. 1974), *aff'd in part, rev'd in part*, 347 A.2d 133 (Del. 1975)	7
Helvering v. *Southwest Consolidated Corp.*, 315 U.S. 194 (1942)	7
Kessler v. *General Cable Corp.*, 92 Cal. App. 3d 531, 155 Cal. Rptr. 94 (1979)	7
Lisman v. *Milwaukee, Lake Shore & Western Railway*, 161 F. 472 (C.C.E.D. Wis. 1908), *aff'd per curiam*, 170 F. 1020 (7th Cir.), *cert. denied*, 214 U.S. 520 (1909)	7
Parkinson v. *West End Street Railway*, 173 Mass. 446, 53 N.E. 891 (1899)	7
Pomierski v. *W.R. Grace & Co.*, 282 F. Supp. 385 (N.D. Ill. 1967)	8
Wood v. *Coastal States Gas Corp.*, 401 A.2d 932 (Del. 1979)	7, 8

STATUTE	
Iowa Code, § 496A.73 (1970)	6

PAGE

TREATISES AND OTHER AUTHORITIES

AMERICAN BAR FOUNDATION, COMMENTARIES ON INDENTURES (1971) 8

W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS (5th ed. unabr. 1980) 7, 8

1 A. DEWING, FINANCIAL POLICY OF CORPORATIONS (5th ed. 1953) 7

H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS (2d ed. 1970) 7

N. LATTIN, R. JENNINGS & R. BUXBAUM, CORPORATIONS, CASES AND MATERIALS (4th ed. 1968)..... 7

Berle, *Convertible Bonds and Stock Purchase Warrants,* 36 YALE L.J. 649 (1927) 8

Fuld, *Some Practical Aspects of a Merger,* 60 HARV. L. REV. 1092 (1947)..... 7

Hills, *Convertible Securities—Legal Aspects and Draftsmanship,* 19 CALIF. L. REV. 1 (1930)..... 7-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-239

DAVID BROAD,

Petitioner,

—VS.—

ROCKWELL INTERNATIONAL CORPORATION, COLLINS RADIO COMPANY and UNITED STATES TRUST COMPANY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF ROCKWELL INTERNATIONAL CORPORATION, COLLINS RADIO COMPANY AND THE INDIVIDUAL RESPONDENTS

PRELIMINARY STATEMENT

This Brief in Opposition is submitted on behalf of respondents Rockwell International Corporation ("Rockwell"), Collins Radio Company ("Collins") and the thirteen individual respondents.*

* Respondents Robert C. Wilson, Robert Anderson, Dupuy Bateman, Jr., Wallace W. Booth, Willard F. Rockwell, Jr., W. William Roodhouse, Donald R. Beall, Raymond J. Raff, Robert L. Cattoi, John E. Drick, J. Rawles Fulgham, Jr., Thomas L. Martin, Jr. and Robert L. Erickson were officers or directors of Rockwell or of

ABSENCE OF CONSTITUTIONAL OR STATUTORY ISSUES

The Petition discusses no constitutional provision, treaty, statute, ordinance or regulation. Petitioner merely questions the proper interpretation of one contract provision in a 102 page standard corporate indenture.

STATEMENT OF THE CASE

(a) The Facts

Collins issued $40,000,000 of convertible debentures in January 1967. It was then a thriving company without any affiliation with Rockwell. (642 F.2d at 933-34)* Collins subsequently experienced severe declines in sales and income. In 1971, with Collins on the verge of bankruptcy, Rockwell invested $35,000,000 in Collins for which it received new series of Collins' securities. Rockwell also provided extensive managerial, technical and additional financial assistance to Collins. (642 F.2d at 934)

In August 1973 Rockwell commenced a tender offer for Collins Common Stock at $25 cash per share, Rockwell's first acquisition of Common Stock. Rockwell simultaneously announced that, if the tender offer were successful, it would propose a cash merger in which the holders of Collins Com-

---

Collins. They were named solely as "controlling persons" allegedly with derivative liability for corporate acts. Collins, an Iowa corporation, was merged into Rockwell, a Delaware corporation, on November 14, 1973.

* For the convenience of the Court, references herein are provided to the published opinion of the *en banc* Court of Appeals which appears in section A-1 of petitioner's appendix. Where references are made to the Joint Appendix submitted to the Court of Appeals, they appear in the form "A ". References to the Petition appear as "Pet. ".

mon Stock would receive the same $25 per share. Rockwell received tenders of 75% of the Common Stock and a merger agreement dated as of October 8, 1973 was entered into by Rockwell and Collins, subject to approval by each class of Collins' shareholders as required by Iowa law. The merger was overwhelmingly approved at a special shareholders' meeting on November 2, 1973 with 84.5% of the holders of Collins Common Stock (other than Rockwell) voting in favor. The merger was then effected on November 14, 1973. Contrary to petitioner's present contentions (Pet. 4, 5), it is undisputed that holders of Collins Common Stock received only cash for their shares—$25 cash per share. (642 F.2d at 934, 950)

The rights of the debentureholders upon the merger were governed by an indenture entered into by Collins in 1967. That indenture required, *inter alia*, that the debentureholders receive a conversion right into whatever the holders of Collins Common Stock received in the merger. Section 4.11 of the indenture (A711; *see* 642 F.2d at 949) states:

> "Section 4.11. In case of any consolidation of the Company with, or merger of the Company into, any other corporation . . . the corporation into which the Company shall have been merged . . . shall execute and deliver to the Trustee a supplemental indenture . . . providing that the holder of each Debenture then outstanding shall have the right (until the expiration of the conversion right of such Debenture) to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such consolidation, merger . . . by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such consolidation, merger, sale, conveyance, transfer or disposition."

As the holders of Collins Common Stock received $25 cash per share, the debentureholders received the right to convert each

$1,000 *face* amount debenture into $344.75 cash.* (*See* 642 F.2d at 934)

(b) The *En Banc* Decision of the Court of Appeals

The Court of Appeals, with twenty-four of twenty-five judges joining in the opinion, affirmed the dismissal of all claims. Concerning the meaning of Section 4.11, the court held (642 F.2d at 950):

> "[I]t is undisputed that the holders of Collins Common Stock received *only cash* [emphasis by Court of Appeals] in exchange for their shares; under the terms of the Merger Plan, they did not receive stock or any other type of property. Thus, the nature of the 'something else' into which the holders of Debentures are entitled to convert in lieu of Collins Common Stock is *cash* [emphasis by Court of Appeals]—not Rockwell Common Stock, not other securities, and not other types of property besides cash."

Summarizing with respect to the contract claims, the court stated (642 F.2d at 963):

> "The district court correctly interpreted the Indenture to provide unambiguously that upon a merger between Collins and another corporation in which Collins was not the surviving company, the sole conversion right of the holders of Debentures was to convert into the kind and amount of property (be it stock, other securities, cash or other property) that would have been received by a holder

---

* Rockwell, of course, assumed "in full all of the obligations of Collins under the Indenture, including the obligation to pay interest, and eventually to repay the principal, on the outstanding Debentures until they either were redeemed or matured in 1987." (642 F.2d at 935) Thus, debentureholders who choose not to convert continue to receive interest payments on the $1,000 face amount and will receive repayment of the full $1,000 principal upon maturity. Moreover, "[i]nsofar as the debt feature of the Debentures is concerned, [the debentureholders] benefited by the merger in that the Debentures are now backed by a financially more secure corporation." (642 F.2d at 957)

> of Debentures had he exercised his conversion right immediately prior to the merger. *Because there was no question but that the defendants have properly recognized this right,* the district court correctly directed a verdict for the defendants on the state-law breach of contract, breach of implied covenant of fair dealing and breach of fiduciary duty claims." (emphasis supplied)

Finding no unfairness (*see* 642 F.2d at 956-59), the Court of Appeals concluded (642 F.2d at 957):

> "Based upon our interpretation of the Indenture, and *without hesitation given the nature of convertible debentures,* we affirm the judgment of the district court with regard to Broad's breach of contract claims." (emphasis supplied)

REASONS FOR DENYING THE WRIT

No federal question is presented. As the Court of Appeals stated (642 F.2d at 946), "the resolution of this case ultimately turns upon . . . [the] construction of the specific language in the Indenture . . . ." No new law was made below nor is there any conflict between courts. The *en banc* court, applying "settled principles of New York law in construing the Indenture" (*id.*), held that the debentureholders' rights were fully respected in the Rockwell-Collins merger. The court's decision was correct and consistent with decades of judicial precedent.

I

PETITIONER'S ARGUMENT IS REFUTED BY ELEMENTARY PRINCIPLES OF LAW AND BY HIS OWN UNCONTROVERTED EVIDENCE

Petitioner's sole argument to this Court is premised on his contention—which is wrong as a matter of law and refuted by the evidentiary record—that "minority" holders of Collins Common Stock received $25 per share in the merger while the

"majority shareholder," Rockwell, received Collins' assets in exchange for its shares.* He attempts to confuse the role of Rockwell as a shareholder of Collins and Rockwell's role as the successor corporation upon the merger. Rockwell acquired Collins' assets (and assumed its liabilities**) only as the *successor corporation upon the merger,* not as shareholder. Under basic principles embodied in every state's law, Rockwell upon the merger "thereupon and thereafter possess[ed] all the rights . . . and all property, real, personal and mixed, . . . and every other interest, of or belonging to" Collins. (Iowa Stats. § 496A.73 (1970)) It is axiomatic that Rockwell would have acquired Collins' assets upon the merger whether or not Rockwell was previously a Collins' shareholder.

---

* Over the seven years of this litigation, petitioner has proffered any number of wholly unsupportable contentions. While one need not dwell at length on abandoned contentions, it is instructive to note that petitioner has spun an ever-changing web of baseless and conflicting arguments to avoid the simple, clear-cut application of Section 4.11 of the Collins indenture. He first proclaimed to the district court that the entire indenture was irrelevant. Then he argued that the indenture's provisions were relevant, were clear and provided him with the so-called "right" he claimed. Then with the closing evidence in his case, petitioner first asserted that the indenture was ambiguous. (*See* 642 F.2d at 939 n.9.) He argued that other provisions in the indenture were inconsistent with and controlled over Section 4.11. (*See* 642 F.2d at 950-55.) Petitioner then tried to persuade the courts below to ignore the indenture and to create contract rights from documents such as tombstone advertisements and press releases or to find such "rights" in the common law. (*See* 642 F.2d at 943-46, 948 n.21.) Even when forced to confront Section 4.11, petitioner pressed multifarious versions of his interpretation of Section 4.11 in order to avoid its plain meaning. (*See* 642 F.2d at 950-51.) Now, petitioner returns again to Section 4.11 and repeats here a frivolous contention which neither the trial court nor the appellate court even deemed worthy of mention.

** Rockwell, as offeror in the tender offer and as successor corporation upon the merger, not only paid $25 per share to each holder of Collins Common Stock but also assumed Collins' obligations of approximately $115 million of long-term debt and another $100 million of current liabilities. *See* Notice of Special Meeting of Shareholders, November 2, 1973, and Proxy Statement of Rockwell International Corporation, dated October 12, 1973. Obviously no holder of Collins Common Stock paid anything in the tender offer or merger.

Moreover, petitioner's bald misstatement (Pet. 4) that "Rockwell, the majority shareholder, received a pro rata share of the Collins assets for each share of its Collins stock" is belied by his own trial exhibit—the merger agreement. The merger agreement (A575-81) expressly provided that all Collins' securities held by Rockwell "shall be cancelled and retired, and no payment shall be made with respect thereto." That was the equivalent of Rockwell *paying itself* $25 per share.*

II

PETITIONER IGNORES THE CONCLUSIVE PRECEDENT UNDERLYING THE DECISIONS BELOW

Petitioner also ignores the extent and unanimity of prior authority. At common law a debentureholder's conversion right was extinguished on a merger, absent express provision. *See Parkinson* v. *West End Street Railway*, 173 Mass. 446, 53 N.E. 891 (1899)(Holmes, J.) and the numerous reaffirmations of that principle by courts** and other authorities.*** Thus, it

---

* Rockwell, as successor corporation, could have paid $25 per share of Collins Common Stock to itself, as a Collins shareholder, by transferring funds from one Rockwell account to another, but that would have been silly.

** *See, e.g., Helvering* v. *Southwest Consolidated Corp.*, 315 U.S. 194, 200-201 (1942); *Lisman* v. *Milwaukee, L.S. & W. Ry.*, 161 F. 472, 476-79 (C.C.E.D. Wis. 1908), *aff'd per cur.*, 170 F. 1020 (7th Cir.), *cert. denied*, 214 U.S. 520 (1909); *Wood* v. *Coastal States Gas Corp.*, 401 A.2d 932, 939-40 (Del. 1979); *Kessler* v. *General Cable Corp.*, 92 Cal. App. 3d 531, 539-40, 155 Cal. Rptr. 94, 99-100 (1979); *Harff* v. *Kerkorian*, 324 A.2d 215, 219 (Del. Ch. 1974), *rev'd on other grounds*, 347 A.2d 133 (Del. 1975).

*** *See, e.g.*, W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 1155 (5th ed. unabr. 1980); H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS 288 n.32 (2d ed. 1970); N. LATTIN, R. JENNINGS & R. BUXBAUM, CORPORATIONS, CASES AND MATERIALS 1251 (4th ed. 1968); 1 A. DEWING, FINANCIAL POLICY OF CORPORATIONS 264 nn.v & 13 (5th ed. 1953); Fuld, *Some Practical Aspects of a Merger*, 60 HARV. L. REV. 1092, 1102 n.32 (1947); Hills, *Convertible*

became commonplace to provide an express contract right in the indenture in language comparable to Section 4.11. *See Brucker* v. *Thyssen-Bornemisza, N.V.*, 424 F. Supp. 679, 689, 695-96 (S.D.N.Y. 1976), *aff'd sub nom. Brucker* v. *Indian Head, Inc.*, 559 F.2d 1202 (2d Cir.),* *cert. denied*, 434 U.S. 897 (1977); *Broenen* v. *Beaunit Corp.*, 440 F.2d 1244, 1248-49 (7th Cir. 1970); W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 1155 (5th ed. unabr. 1980); AMERICAN BAR FOUNDATION, COMMENTARIES ON INDENTURES 528 (1971). Under that standard contract provision, the debentureholders receive the right upon a merger to convert into only the securities or property received by the common shareholders in the merger.**

In *Brucker* the court reviewed an indenture provision like section 4.11 of the Collins indenture in the context of a cash merger. There, as here, the successor corporation was the majority shareholder prior to the merger. Obviously there, as here, the successor corporation acquired the assets of the merged one. The court held that debentureholders upon a merger have "only the right to convert into whatever form of 'property' the shareholders would receive." (424 F. Supp. at 689) There, as here, that "property" was cash, not the assets of the merged entity. *Cf. B.S.F. Co.* v. *Philadelphia National Bank*, 42 Del. Ch. 106, 204 A.2d 746, 751-52 (Del. 1964).

Securities—Legal Aspects and Draftsmanship, 19 CALIF. L. REV. 1, 31-33 (1930); Berle, *Convertible Bonds and Stock Purchase Warrants*, 36 YALE L.J. 649, 662 (1927).

* The Second Circuit found no reason to issue a written opinion on the appeal. It affirmed in an oral opinion from the bench "in the belief that no jurisprudential purpose would be served by a written opinion. An oral opinion or summary order is not citable as precedent. [Second Circuit] Local Rule § 0.23." 599 F.2d at 1202 n.*. This Court then declined review by denial of a petition for certiorari.

** Courts similarly interpret comparable contracts which govern preferred stock and warrants. *See Wood* v. *Coastal States Gas Corp.*, 401 A.2d 932, 939 (Del. 1979); *Pomierski* v. *W.R. Grace & Co.*, 282 F. Supp. 385, 388-89, 396 (N.D. Ill. 1967).

The decisions of the District Court and the Court of Appeals were based upon substantial and conclusive precedent and enduring practices in the banking and securities industries. By contrast, petitioner offers only his own frivolous interpretation without the citation of a single case or other authority. Clearly, no issue is presented which warrants review by this Court.

CONCLUSION

For the reasons set forth, Rockwell International Corporation, Collins Radio Company and the individual respondents respectfully request this Court to deny the petition for writ of certiorari.

September 30, 1981

Respectfully submitted,

DONALD I STRAUBER
EDWIN D. SCOTT
30 Rockefeller Plaza
New York, New York 10112
(212) 541-5800
Attorneys for Rockwell International Corporation, Collins Radio Company and the Individual Respondents

TERRY A. THOMPSON
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10112

and

ERNEST E. FIGARI, JR.
JOHNSON SWANSON & BARBEE
4700 First International Building
Dallas, Texas 75202

Of Counsel.

RULE 28.1 LISTING OF SUBSIDIARIES AND AFFILIATES OF ROCKWELL INTERNATIONAL CORPORATION*

Company	*Country of Incorporation*
Accessories Arpel S.A.	France
Braseixos S.A.	Brazil
Brasprensas S.A.	Brazil
Collins Radio Company of Japan Limited	Japan
Compagnie Industrielle de Macanismes S.A.	France
Dina Rockwell Nacional, S.A.	Mexico
Draper de Mexico S.A. de C.V.	Mexico
Euro-Plastique, S.A.	France
Ikegai-Goss Co. Ltd.	Japan
Industrias Telug, S.A.	Spain
Metalurgica Carabobo, S.A.	Venezuela
PHI Magnetronics, Ltd.	United Kingdom
Rockwell Standard of Australia Ltd.	Australia
Rockwell Valves S.A.	France
Rubery Owen-Rockwell Ltd.	United Kingdom
Ser[illegible]ture Auto Meridionali Stampi Attrezzature, S.p.A.	Italy
SASFB, A.G.	Liechtenstein
Serck Limited	United Kingdom
Setec S.p.A.	Italy
Societe Civile Immobiliere de Sully-Sur-Loire	France
Societe Civile Immobiliere Volta	France
Telehoist Humblet, N.V.	Belgium
Telehoist Storer, Ltd.	United Kingdom
USHA Telehoist, Ltd.	India
Wescom American Lease Company	U.S.A.

* The entities here listed include direct and indirect active subsidiaries of Rockwell (other than wholly owned) and active companies in which Rockwell directly or indirectly owns between 20% and 50%, inclusive.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing BRIEF IN OPPOSITION ON BEHALF OF ROCKWELL INTERNATIONAL CORPORATION, COLLINS RADIO COMPANY AND THE INDIVIDUAL RESPONDENTS have been served by mail upon each party required to be served by depositing same in a United States mailbox, first-class postage prepaid, and addressed to each of the following this 30th day of September, 1981:

HUGO L. BLACK, JR., ESQ.
Kelly, Black, Black & Earle, P.A.
1400 Alfred I. duPont Building
Miami, Florida 33131
(Counsel of Record for Petitioner)

T. BARRY KINGHAM, ESQ.
Curtis, Mallet-Prevost, Colt & Mosle
100 Wall Street
New York, New York 10005
(Counsel of Record for Respondent
United States Trust Company of New York)

Edwin D. Scott

EDWIN D. SCOTT

Opposition

2

No. 81-239

IN THE

Supreme Court of the United States

October Term, 1981

DAVID BROAD, et al.,

Petitioners,

—vs.—

ROCKWELL INTERNATIONAL CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT UNITED STATES TRUST COMPANY OF NEW YORK IN OPPOSITION

T. BARRY KINGHAM
100 Wall Street
New York, New York 10005
(212) 248-8111

Counsel for Respondent United States Trust Company of New York

Of Counsel:

JOHN F. EGAN
NORBERT M. SEIFERT
CURTIS, MALLET-PREVOST, COLT & MOSLE

WILLIAM B. WEST, III
CLARK, WEST, KELLER, BUTLER & ELLIS
First International Building
Dallas, Texas 75270

August 14, 1981

Question Presented

Was the Court of Appeals correct in affirming, *en banc*, the District Court's dismissal of this class action on the ground that the Petitioners-debenture holders received all to which they were entitled under the terms of the trust indenture?

Table of Contents

PAGE

Question Presented i

Counter-Statement of the Case 1

Reasons Why the Petition Should Be Denied 4

ARGUMENT 5

I. The Courts Below Correctly Held that All Contract Rights of Petitioners Were Honored in the Collins-Rockwell Merger 5

II. Petitioners Have Set Forth No Basis For Review By This Court 7

CONCLUSION 8

PAGE

Table of Authorities

Cases:

Broenen v. *Beaunit Corp.*, 440 F.2d 1244 (7th Cir. 1970) 5

Brucker v. *Thyssen-Bornemisza Europe, N.V.*, 424 F. Supp. 679 (S.D.N.Y. 1976), *aff'd sub nom. Brucker* v. *Indian Head, Inc.*, 559 F.2d 1202 (2d Cir.), *cert. denied*, 434 U.S. 897 (1977) .. 4-5, 6

B.S.F. Co. v. *Philadelphia National Bank*, 204 A.2d 746 (Del. 1974) 6

Lisman v. *Milwaukee L.S. & W. Ry.*, 161 F. 472 (C. C.E.D. Wisc. 1908), *aff'd*, 170 F. 1020 (7th Cir.), *cert. denied*, 214 U.S. 520 (1909) 6-7

Parkinson v. *West E. St. Ry.*, 173 Mass. 446, 53 N.E. 891 (1899) 6

Statutes and Rules:

17 C.F.R. § 240.10b-5 4

Fed. R. Civ. P. 23 4

N.Y. Gen. Constr. L. § 39 (McKinney 1951) 6

15 U.S.C. § 77aaa *et seq.* 2

15 U.S.C. § 78j(b) 4

U.S. Sup. Ct. R. 17 ..... 4, 7

U.S. Sup. Ct. R. 28 ..... 2 n.*

Other Authorities:

AMERICAN BAR FOUNDATION, COMMENTARIES ON INDENTURES (1971) 6

IN THE

Supreme Court of the United States

October Term, 1981

No. 81-239

DAVID BROAD, et al.,

Petitioners,

—vs.—

ROCKWELL INTERNATIONAL CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT UNITED STATES TRUST COMPANY OF NEW YORK IN OPPOSITION

Counter-Statement of the Case

This case involves the rights of holders of debentures of Collins Radio Company ("Collins") following the merger of Collins into Rockwell International Corporation ("Rockwell") in 1973. The Court of Appeals for the Fifth Circuit, sitting *en banc*, correctly held, by a vote of 24 to 1, that Respondent United States Trust Company of

New York ("the Trust Company"),* Rockwell and other defendants had complied fully with the terms of an indenture pursuant to which the Trust Company was indenture trustee and that, in connection with the merger of Collins into Rockwell, the Trust Company had acted properly (A-1 at 963).**

A. The issuance of debentures and appointment of an indenture trustee

In early 1967, Collins issued $40,000,000 principal amount of 4 7/8% Convertible Subordinated Debentures due January 1, 1987 (the "Debentures") (A-1 at 933). As required by the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa *et seq.*, Collins executed an indenture (the "Indenture") and appointed Chase Manhattan Bank N.A. ("Chase") as indenture trustee. In May, 1970, Collins, Chase and the Trust Company signed a supplemental indenture, by which the Trust Company succeeded Chase as indenture trustee (A-1 at 932).

B. The merger of Collins into Rockwell

In August, 1973, Rockwell made a successful tender offer for outstanding shares of Collins common stock at $25 per share (A-1 at 934). Collins was merged into and became a division of Rockwell in November 1973 (A-1 at 934). As part of the merger and as required by

---

* *Statement Pursuant to Rule 28.1 of the Rules of this Court*: The Trust Company is a wholly-owned subsidiary of U.S. Trust Corporation. The Trust Company's subsidiaries are UST Advisory, Inc.; UST Capital Corp.; United States Trust Co. of New York Ltd.; United States Trust International Corp.; United States Trust London Ltd.; and United States Trust Co. (Grand Cayman) Ltd.

** Citations to the "Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit," filed by Petitioners herein, are in the form "(Pet. at ——)." Citations to the Appendix are in the form "(A. — at ——)."

the Indenture, Rockwell assumed Collins' obligations to the Debenture-holders under the Indenture by executing a supplemental indenture with the Trust Company ("the Supplemental Indenture") (A-1 at 937).

C. The rights of Debenture-holders in the merger

As the Court of Appeals correctly recognized (A-1 at 941), the contractual rights of debenture holders are expressed in an indenture. The Indenture in this case provided in Section 4.11 that in the event of a merger of Collins into another corporation, that corporation

> . . . shall execute and deliver to the [Trust Company] a supplemental indenture . . . providing that the holder of each Debenture then outstanding shall have the right (until the expiration of the conversion right of such Debenture) to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such . . . merger . . . by a holder of the number of shares of Common Stock of [Collins] into which such Debenture might have been converted immediately prior to such . . . merger . . . (A-1 at 949).

Prior to the merger, Rockwell advised the Collins Debenture-holders that they would retain their right to convert the Debentures, and that the Debentures would not be convertible into Rockwell common stock, or Collins common stock (which would not exist after the merger), but into cash in an amount equal to what they would have received for their shares of Collins common stock had they converted their Debentures just prior to the merger. On the merger date the Debentures were convertible into 13.79 shares of Collins common stock (A-1 at 951). Since Rockwell paid $25 a share to all holders of Collins common stock other than itself, each

$1,000 Debenture could be converted after the merger into $344.75 in cash (A-1 at 951).

D. Petitioners' claims

Petitioner David Broad, a Debenture-holder at the time of the merger, brought this action in May 1974 for alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder (A-4 at 1, 2). In addition, Petitioner asserted various claims alleging breach of contract, common law fraud and breach of fiduciary obligation (A-4 at 2). Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the District Court permitted the action to proceed as a class action on behalf of holders of Debentures at the time of the merger.

Reasons Why the Petition Should Be Denied

1. Petitioners have presented no "special and important reasons" for this Court to review the *en banc* decision of the Court of Appeals for the Fifth Circuit. *See* U.S. Sup. Ct. R. 17.1. This is simply a case of contract construction in which the Court of Appeals correctly held that Respondents had fulfilled their contractual obligations pursuant to the Indenture and the Supplemental Indenture. The Indenture and the Supplemental Indenture were the sole expression of the contractual rights of the Debenture-holders. They permitted mergers and provided for precise treatment of the Debentures upon merger. Those provisions were followed exactly. There is no public policy or any other special reason which compels review of this case.

2. There is no conflict among the circuits or between the Fifth Circuit and any state court decision which would require review by this Court. *See Brucker* v.

Thyssen-Bornemisza Europe, N.V., 424 F. Supp. 679 (S.D.N.Y. 1976), *aff'd sub nom. Brucker* v. *Indian Head, Inc.*, 559 F.2d 1202 (2d Cir.), *cert. denied*, 434 U.S. 897 (1977); *Broenen* v. *Beaunit Corp.*, 440 F.2d 1244 (7th Cir. 1970).

ARGUMENT

I.

The Courts Below Correctly Held that All Contract Rights of Petitioners Were Honored in the Collins-Rockwell Merger.

The Debenture-holders acknowledge in their petition to this Court that the issue in the instant case is one solely of contract construction (Pet. at 1-2). As such, the District Court and the Court of Appeals for the Fifth Circuit correctly disposed of all issues raised by the Debenture-holders by referral to that provision in the Indenture which dealt specifically with the effects of merger or consolidation on a Debenture-holder, Section 4.11. Reference to that provision demonstrates that the Petitioners received all to which they were entitled, that the courts below were clearly correct, and that the instant application for a writ of certiorari should be denied in all respects.

Section 4.11 of the Indenture, quoted above, p. 3, is unambiguous. It provides clearly that, upon merger or consolidation with another company, the Debenture-holders would receive for their conversion rights exactly what the Collins common stockholders would receive, whether that be securities or property. "Property" includes

"cash." N.Y. Gen. Constr. L. § 39 (McKinney, 1951);* *Brucker* v. *Thyssen-Bornemisza Europe, N.V.*, 424 F. Supp. 679 (S.D.N.Y. 1976), *aff'd sub nom. Brucker* v. *Indian Head, Inc.*, 559 F.2d 1202 (2d Cir.), *cert. denied*, 434 U.S. 897 (1977); *B.S.F. Co.* v. *Philadelphia National Bank*, 204 A.2d 746 (Del. 1974). Because the common stockholders of Collins, other than Rockwell, received only cash for their stock, the Debenture-holders, upon conversion, had the right to receive only cash for their Debentures.

Petitioner asserts in his petition that because Rockwell received the assets of Collins upon merger, the Debenture-holders had a right to receive a portion of those assets (Pet. at 9-10). The fallacy in that position is demonstrated by an examination of the component parts of a "cash-out" merger. It is a simplification into one step of what would otherwise be a two-step process. The two-step process would consist of the sale to Rockwell of assets by Collins followed by a liquidation of Collins with cash distributions to all shareholders, including Rockwell. By utilizing the "cash-out" merger, Rockwell merely avoided the additional step of—in effect—paying itself.

It is beyond doubt that upon merger, the rights of holders of convertible debentures of the acquired corporation to convert their debentures into stock may be extinguished, absent contractual provisions to the contrary. AMERICAN BAR FOUNDATION, COMMENTARIES ON INDENTURES 527 (1971); *see Parkinson* v. *West E. St. Ry.*, 173 Mass. 446, 53 N.E. 891 (1899) (Holmes, J.); *see also Lisman* v. *Milwaukee L.S. & W. Ry.*, 161 F. 472, 478

---

* The Indenture explicitly provided in Section 17.12 that it was to be governed by New York law.

(C.C.E.D. Wisc. 1908), *aff'd mem*, 170 F. 1020 (7th Cir.), *cert. denied*, 214 U.S. 520 (1909) ("If [as a result of consolidation] the hope of speculative venture on the stock market [by debenture-holders] was extinguished, it is damnum absque injuria.") There was no provision in the Indenture in this case providing the Debenture-holders with an explicit right to a distribution of Collins assets in the event of merger or consolidation. To the contrary, Section 4.11 of the Indenture, the only provision dealing with the effect of merger or consolidation upon the Debenture-holders, provides that, in the event of such merger or consolidation, the Debenture-holders would receive upon conversion only that which the holders of Collins common stock received. Thus, the courts below correctly held that, because the holders of Collins common stock received only cash for their stock, the Debenture-holders were entitled to convert only into cash after the merger according to the formula provided in Section 4.11 (A-1 at 963).

II.

Petitioners Have Set Forth No Basis For Review By This Court.

Petitioners' public policy contentions are without merit. The issue here is one of contract construction; there is no unique issue of federal law. Further, Petitioners have made no showing that this case is within any of the categories discussed in this Court's Rule 17, which sets forth considerations governing review on certiorari. Specifically, there is no conflict among the circuits; there is no conflict between the Fifth Circuit and decisions of the Courts of the State of New York (whose laws govern the Indenture); and there has been no departure from the accepted and usual course of judicial proceedings. We respectfully submit that this case, which involves only construction of the unambiguous terms of the Indenture,

is a particularly inappropriate one in which to grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

T. BARRY KINGHAM
100 Wall Street
New York, New York 10005
(212) 248-8111

Counsel for Respondent
United States Trust Company
of New York

Of Counsel:

JOHN F. EGAN
NORBERT M. SEIFERT
CURTIS, MALLET-PREVOST, COLT & MOSLE

WILLIAM B. WEST, III
CLARK, WEST, KELLER, BUTLER & ELLIS
First International Building
Dallas, Texas 75270

August 14, 1981